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THE

# LAW OF LANDLORD AND TENANT,

## AS ADMINISTERED IN BENGAL,

WITH

## ACT VIII., 1869,

OF

## THE BENGAL COUNCIL.

---

THE RULINGS OF THE HIGH COURT

HAVE BEEN BROUGHT DOWN TO DECEMBER, 1869

---

BY

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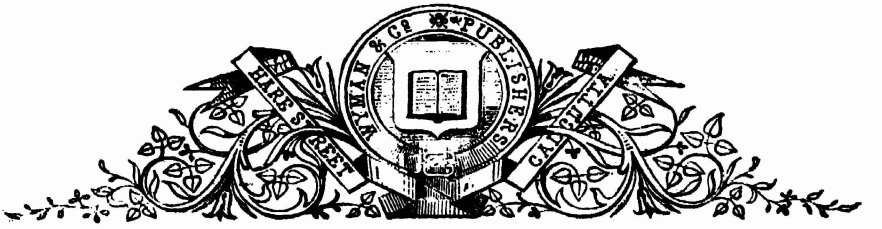


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# PREFACE.

THE passing of Act VIII. of 1869 of the Bengal Council appeared to me a favourable opportunity for bringing out a new edition of the Law of Landlord and Tenant, as current in Bengal. The present work is an attempt to illustrate each section of the Law by a well-arranged Digest of the various decisions of the learned Judges of the High Court, and copious extracts are given from the reports, in order to illustrate the principles upon which the decisions are based.

It will be observed that Act VIII. of 1869 has made no change in the substantive Law, it is merely a re-enactment of Act X. of 1859, with the procedure sections omitted. To make, therefore, the book useful to officers who have still to administer Act X. of 1859, I have noted the corresponding sections of that Act in the margin.

In conclusion, I take this opportunity of acknowledging the obligations I am under to Mr. Chapman, whose work upon the Rent Law contains the most complete abstract of all the earlier rulings upon Act X. of 1859.

H. BELL.

# CONTENTS.


PAGE.

I.—INTERPRETATION OF COLLECTOR ..... 1

II.—RYOTS ENTITLED TO A POTTAH ib.

*Right of quiet enjoyment under lease* ..... 2

*Tenant estopped from disputing landlord's title* ..... ib.

*Leases of lessors with limited interest* ..... 3

*Rent in kind* ..... ib.

*Registration of leases* ..... 4

*Stamp-duty upon leases* ..... ib.

III.—RYOTS HOLDING LAND AT FIXED RATES ..... 5

*Fixed rates* ..... 5, 6

*Permanent Settlement* ..... 7

*Effect of holding from* ..... ib.

IV.—PRESUMPTION IF RENT HAS NOT CHANGED FOR 20 YEARS ..... 8

*Not defeated by tenant setting up a forged pottah* ..... ib.

*Jageerdars or trespassers cannot claim* ..... 9

*Must be consistent with holding from permanent settlement* ..... ib.

*Proof necessary to establish* ..... 10

*Effect of break in tenancy upon* ..... 11

*Value of jumma wasilbakee papers as evidence of* ..... ib.

*Only applies to ryots* ..... ib.

V.—RYOTS HAVING RIGHTS OF OCCUPANCY TO WHAT POTTAHS ENTITLED ..... 12

VI.—RIGHT OF OCCUPANCY AFTER 12 YEARS' HOLDING ..... ib.

*Nature of right and in what cases acquirable* ..... 13

*Hereditary* ..... ib.

*When acquirable in neej-jote land* 14

*Not acquirable by trespasser* ..... ib.

*In what cases transferable* ..... ib.

*How affected by a lease for a term* 15

PAGE.

*Position of occupancy-ryot who sub-lets* ..... 16

*Can a right of occupancy be acquired under 12 years* ..... ib.

VII.—RIGHT OF OCCUPANCY WHEN BARRED BY TERMS OF WRITTEN CONTRACT ..... 17

*Question discussed* ..... ib.

VIII.—RYOTS NOT HAVING OCCUPANCY RIGHTS ..... 18

*Cannot sue for pottah* ..... ib.

*Only liable to pay a fair rent* ..... 19

*Entitled to notice before enhancement* ..... ib.

IX.—COURT TO FIX PERIOD OF POTTAH IN CERTAIN CASES ..... ib.

*Position of ryot with regard to pleadings in such cases* ..... 20

X.—GRANTOR OF POTTAH ENTITLED TO KABULIAT ..... 21

*Suit for kabuliat at enhanced rates* ..... ib.

*Only rates sued for can be decreed* 22

*Share-holders and kabuliat* ..... ib.

*Non-occupancy-ryots and kabuliats* 23

*Registration of kabuliats* ..... ib.

*Stamps upon kabuliats* ..... ib.

XI.—DAMAGES FOR EXACTION OF RENT ..... ib.

*Illegal cesses* ..... 24

*Illegal exactions* ..... ib.

*Receipts* ..... 25

*Damages for withholding* ..... ib.

*Stamps upon* ..... ib.

*Appropriation of payments* ..... ib.

XII.—LAND-HOLDER NOT TO COMPEL ATTENDANCE OF RYOT ..... 26

XIII.—DAMAGES FOR EXTORTING PAYMENT BY DURESS ..... ib.

XIV.—NOTICE OF ENHANCEMENT 27

*What to contain* ..... ib.

PAGE.

*Indistinct notices* ..... 28
*Service of* ..... 29

XV.—MODE OF CONTESTING ENHANCEMENT OF RENT ..... 30

*Burden of proof in such suits* ..... 31
*Only occupancy-ryots can sue* ..... *ib.*

XVI.—DEPENDENT TALOOKS ..... 32

*Effect of Government sale upon* ... *ib.*
*Grounds for enhancing rent of* ..... *ib.*
*Customary rates of the district* ..... 33
*Rule to be followed where customary rates are unknown* ..... *ib.*
*Assessment of accretions to* ..... 34
*Construction of leases* ..... 35
*Hereditary and non-hereditary leases* ..... *ib.*
*Effect of usage in interpreting* ..... 36
*Leases with defined boundaries* ..... 37
*Jungle booree leases* ..... *ib.*
*Service tenures* ..... 38
*Under-tenures voidable after Government sale* ..... 39
*Time allowed for cancelling* ..... 40

XVII.—PRESUMPTION FROM HOLDING AT UNCHANGED RENT FOR 20 YEARS ..... *ib.*

XVIII.—GROUNDS OF ENHANCEMENT OF RENT OF OCCUPANCY-RYOT ..... *ib.*

*Prevailing rate* ..... 41
*Ryots of same class* ..... 42
*Places adjacent* ..... *ib.*
*Increase in value of produce* ..... *ib.*
*Principle of proportion* ..... 43
*Increase in value from ryots' exertions* ..... 44
*Excess land* ..... 45
*Holder of, not a trespasser* ..... *ib.*
*Leases with specified boundaries* ... 46

XIX.—ABATEMENT OF RENT ..... 47

*Grounds of* ..... *ib.*
*Diluvion* ..... 46
*Land taken up for public purposes* 47
*Dispossession* ..... *ib.*
*Principle upon which abatement should be made* ..... *ib.*
*All ryots can claim* ..... 48
*Act of God* ..... *ib.*

PAGE.

*Zemindars cannot claim from Government* ..... 49

XX.—RELINQUISHMENT ..... 50

*Verbal notice in, when sufficient* ... 51
*Absconding of ryot tantamount to* ... *ib.*
*Stamp-duty upon* ..... *ib.*

XXI.—DEFINITION OF ARREAR OF RENT ..... *ib.*

*Interest when awardable on* ..... 52
*Waiver of interest* ..... *ib.*

XXII.—EJECTMENT OF RYOT FOR ARREARS ..... *ib.*

*Effect of receipt of rent* ..... *ib.*

XXIII.—CANCELMENT OF LEASE FOR ARREARS ..... 53

*Transferable tenures* ..... *ib.*
*Can be sold, but not cancelled* ..... *ib.*
*Damages for breach of covenant* ..... 54
*Waiver of forfeiture* ..... *ib.*
*Void and voidable* ..... *ib.*
*Equitable relief in cases of forfeiture* ..... 55
*Tenant holding over bound by condition of lease* ..... *ib.*

XXIV.—SUITS AGAINST SURBURAKARS ..... 56

XXV.—RIGHT OF MEASUREMENT *ib.*

*Proprietor not in possession cannot measure* ..... 57
*Lakhiraj land* ..... *ib.*

XXVI.—REGISTRY OF TRANSFER OF UNDER-TENURES ..... 58

*Ryottee tenures need not be registered* ..... *ib.*
*Penalty for non-registration* ..... 59
*Consequences of non-registration* ... *ib.*
*Recognition of unregistered tenant by landlord* ..... 60
*Suit to compel registration* ..... *ib.*

XXVII.—TO WHAT SUITS LIMITATION OF ONE YEAR APPLIES ..... *ib.*

XXVIII.—LIMITATION IN SUITS FOR POTTAHS, &c. ..... 61

XXIX.—LIMITATION IN SUITS FOR ARREARS OF RENT ..... *ib.*

PAGE.

*Act XIV., 1859, not applicable to rent suits* ..... 61
*No deduction allowed for legal disability* ..... 62
*Reversal of sale of tenure sold for arrears* ..... *ib.*
*Declaratory decree not a cause of action* ..... 63
*Omission to pay rent for 12 years* *ib.*
*Enhanced rent* ..... *ib.*
*Malikana* ..... *ib.*

XXX.—LIMITATION IN SUITS AGAINST AGENTS ..... *ib.*

*Who are Agents* ..... 64
*Limitation in suits against sureties of Agents* ..... *ib.*
*Powers of Agents* ..... 65
*Ratification of unauthorized acts of Agents* ..... 66
*Liabilities of Agents* ..... *ib.*
*Disbursements by Agents* ..... 63
*Liability of heir of Agent* ..... *ib.*
*Limitation in suits against Agents* 67
*Where Agent absconds* ..... *ib.*
*Or furnishes fraudulent accounts* *ib.*

XXXI.—SUITS FOR BALANCE AFTER DEPOSIT ..... *ib.*

*Deposits* ..... 68

XXXII.—NAIBS TO BE DEEMED AUTHORIZED AGENTS ..... *ib.*

*Stamp upon written authority* ..... 69
*Suit to be brought in name of principal* ..... *ib.*

XXXIII.—COGNIZANCE OF SUITS *ib.*

XXXIV.—PROCEEDINGS TO BE REGULATED BY THE CIVIL PROCEDURE CODE ..... 70

XXXV.—JURISDICTION IN CERTAIN CASES ..... *ib.*

XXXVI.—PROVISION WHERE LAND IS SITUATED IN DIFFERENT JURISDICTIONS ..... *ib.*

XXXVII.—PROCEDURE WHERE MEASUREMENT IS OPPOSED ..... 71

*Stamp upon application for measurement* ..... *ib.*
*Separate application for each ryot unnecessary* ..... *ib.*

PAGE.

XXXVIII.—MEASUREMENT BY COLLECTOR WHEN TO BE MADE 71

*Detailed survey* ..... 72
*Who are authorized to make* ..... 73

XXXIX.—PROCEEDINGS ON COMPLETION OF MEASUREMENT ..... *ib.*

XL.—COLLECTORS' POWERS, &c. ..... 74

XLI.—MEASUREMENT TO BE MADE BY PERGUNNAH POLE ..... *ib.*

*Standard pole* ..... *ib.*
*Who is to determine* ..... *ib.*

XLII.—REGISTER OF SUITS ..... 75

XLIII.—FORM OF PLAINTS ..... *ib.*

XLIV.—AWARD OF DAMAGES IN ARREARS ..... *ib.*

*Under what circumstances to be made* ..... 76
*To be given in lieu of interest* ..... *ib.*

XLV.—AWARD OF COMPENSATION TO DEFENDANT ..... *ib.*

XLVI.—PAYMENT INTO COURT AFTER TENDER ..... 77

XLVII.—PROCEDURE TO BE FOLLOWED ..... *ib.*

*Stamp on applications for deposit* 78

XLVIII., XLIX.—PAYMENT INTO COURT AFTER ACTION BROUGHT *ib.*

L.—SUITS IN WHICH ARREST BEFORE JUDGMENT CANNOT ISSUE 79

LI.—SUITS FOR EJECTMENT OR CANCELMENT OF LEASE ..... *ib.*

*Equitable relief granted by this Section* ..... 80
*Extends to all cases of forfeiture for non-payment* ..... *ib.*

LIII., LIV.—IMMEDIATE EXECUTION IN CERTAIN CASES OF EJECTMENT ..... *ib.*

*Appellate Court alone can stay execution* ..... 81

LV., LVI.—EXECUTION OF DECREE FOR POTTAHS AND KABULIATS ..... *ib.*

LVII.—SIMULTANEOUS EXECUTION AGAINST PERSON AND PROPERTY PROHIBITED ..... 82

PAGE.

LVIII.—EXECUTION IN SUITS UNDER RS. 500 NOT TO ISSUE AFTER THREE YEARS..... 82

*Costs of execution to be reckoned as part of the decree*..... *ib.*

*Date from which the three years is to be reckoned* ..... ..... 83

LIX.—PROCEDURE ON SALE OF UNDER-TENURE ..... *ib.*

*Under-tenure hypothecated for rent* 84

*Cannot after sale be re-sold for previous arrears*..... *ib.*

*Sales impeachable for fraud*..... *ib.*

*Sales under ex-parte decrees*..... 85

LX.—NOTICE OF SALE..... *ib.*

LXI.—UNDER-TENURE NOT TO BE SOLD IF OTHER EXECUTION IS IN FORCE..... 86

*Immoveable property when liable for sale*..... *ib.*

LXII.—PAYMENT OF DECREE BY PERSON INTERESTED IN THE TENURE..... ..... 87

LXIII.—PROCEDURE WHERE UNDER-TENURE IS CLAIMED BY THIRD PARTY..... *ib.*

*Unregistered under-tenant cannot claim*..... 88

LXIV.—EXECUTION OF DECREES IN FAVOUR OF SHARERS..... *ib.*

LXV.—EXECUTION AGAINST IMMOVEABLE PROPERTY..... 89

LXVI.—AUCTION-PURCHASER OF SUPERIOR TENURE..... *ib.*

*Can void under-tenures*..... 90

PAGE.

*Right of cancellation when to be exercised*..... 90

*Sales under old procedure*..... *ib.*

LXVII.—SUIT TO COMPEL REGISTRATION..... ..... *ib.*

LXVIII.—LXXI.—THE LAW OF DISTRAINT .....91, 92

LXXIII.—XCV.—THE PROCEDURE TO BE FOLLOWED.....93-100

XCVI.—SUITS BY THIRD PARTY CLAIMING THE PROPERTY DISTRAINED..... *ib.*

XCVII.—XCIX.—SUITS FOR DAMAGES FOR WRONGFUL OR ILLEGAL DISTRAINT .....100, 101

*Penalty for illegal distraint*..... *ib.*

C.—TIME WITHIN WHICH SUCH SUITS ARE TO BE BROUGHT..... 102

CI.—RESISTANCE OF DISTRAINT... *ib.*

CII.—APPEALS UNDER THIS ACT... *ib.*

CIII.—REVIEW OF JUDGMENT.... 103

CIV.—SMALL CAUSE COURT NOT TO HAVE JURISDICTION..... *ib.*

CV.—POWER TO ISSUE PROCESS FREE OF CHARGE..... *ib.*

CVI.—APPLICATION OF ACT..... *ib.*

CVII.—ENACTMENTS REPEALED... *ib.*

CVIII.—PENDING SUITS..... 104

CIX.—CHOTA-NAGPORE TENURES' ACT NOT AFFECTED ..... *ib.*

CX.—NOR ACT VII. (B.C.) OF 1868..... *ib.*

CXI.—TITLE OF ACT ..... *ib.*

*The following Table places in juxta-position the Sections of Act X., 1859, and the corresponding Sections of the present Act.*

| Act X., 1859. | Act VIII., 1869. | Act X., 1869. | Act VIII., 1859. | Act X., 1859. | Act VIII., 1869. |
|---|---|---|---|---|---|
| 1 | Omitted. | 32 | 29 | 121 | 77 |
| 2 | 2 | 33 | 30 | 122 | 78 |
| 3 | 3 | 34-68 | Omitted. | 123 | 79 |
| 4 | 4 | 69 | 32 | 124 | 80 |
| 5 | 5 | 70-75 | Omitted. | 125 | 81 |
| 6 | 6 | 76 | 9 | 126 | 82 |
| 7 | 7 | 77 | Omitted. | 127 | 83 |
| 8 | 8 | 78 | 52 | 128 | 85 |
| 9 | 10 | 79 | Omitted. | 129 | 86 |
| 10 | 11 | 80 | 55 | 130 | 87 |
| 11 | 12 | 81 | 56 | 131 | 88 |
| 12 | 13 | 82-91 | Omitted. | 132 | 89 |
| 13 | 14 | 92 | 58 | 133 | 90 |
| 14 | 15 | 93-104 | Omitted. | 134 | 91 |
| 15 | 16 | 105 | 59-61 | 135 | 92 |
| 16 | 17 | 106 | 63 | 136 | 93 |
| 17 | 18 | 107 | Omitted. | 137 | 94 |
| 18 | 19 | 108 | 64 | 138 | 95 |
| 19 | 20 | 109-111 | Omitted. | 139 | 96 |
| 20 | 21 | 112 | 68 | 140 | Omitted. |
| 21 | 22 | 113 | 69 | 141 | 97 |
| 22 | 23 | 114 | 70 | 142 | 98 |
| 23-26 | Omitted. | 115 | 71 | 143 | 99 |
| 27 | 26 | 116 | 72 | 144 | 100 |
| 28 | Omitted. | 117 | 73 | 145 | 101 |
| 29 | 24 | 118 | 74 | 146-168 | Omitted. |
| 30 | 27 | 119 | 75 | | |
| 31 | 28 | 120 | 76 | | |

# ABBREVIATIONS.

| | | |
|---|---|---|
| Board's Rep. | ... | Reports of rulings in rent cases, published by the Board of Revenue in 1865-1866. |
| Marsh. Rep. | ... | Marshall's Reports. |
| Ind. Jur. | ... | Indian Jurist. |
| Suth. F. B. Rulings | ... | Sutherland's Full Bench Rulings. |
| W. R. | ... | Sutherland's Weekly Reporter. |
| B. L. R. | ... | Bengal Law Reports. |

# ADDENDA.

THE following important decisions were delivered while the work was passing through the Press:—

Kabuliats.—*Okhoy Sunker Chuckerbutty* v. *Rajah Indro Bhoosun Deb Rai*, 12, W. R., (F. B.) 27, which lays down—

1*st*.—That a landlord must tender a pottah before he can sue for a kabuliat.

2*nd*.—That a suit for a kabuliat at an enhanced rate of rent cannot be supported without a previous notice under Section 13, Act X., 1859, (Section 14 of this Act.) This ruling cancels the precedent quoted at page 21 of this book.

Dependent Talookdar.—*Bamasoonderee Dassia* v. *Radhika Chowdhry*, decided by the Privy Council on the 13th December, 1869, authoritatively rules that the rent of a dependent talook, whether registered under Section 48, Regulation VIII., 1793, or not, can only be enhanced on the grounds stated in Section 51 of that Regulation; *vide* page 33 of this work.

# ERRATUM.

Page 47, line 19, for *exacts* read "enacts."

# TABLE OF CASES.


A.

Abdool Ali, 3.
Adjoodhya Pershad, 13.
Ahmed Ali, 40.
Ahmuty *v.* Brodie, 25.
Alum Chunder Shah, 55.
Anundolall Dass, 3.
Arsurddeen, 47.
Assuroodeen, 49.

B.

Badooroonissa Chowdrain, 41, note.
Bagruth Dass, 43.
Bakranath Mundle, 19, 28.
Baney Madhub Ghose, 3.
Barry *v.* Abdool Ali, 48.
Beckwith *v.* Kisto Jeebun Buxshee, 52.
Beemchanand, 33.

C.

Campbell *v.* Abdool Huc, 83.
Campbell *v.* Kishen Dhun Audhikaree, 20.
Chowdhry Chutterpaul Sing, 67.
Chowdhry Khan, 44.
Chunder Cowar Rai, 14.
Chunder Kanto Sarma, 85.
Chunder Monee Dassee, 29.

D.

David *v.* Ramdhun Chatterjee, 46.
Deanatulla, 87.
Degumber Mitter, 30.
Denonath Bose, 31, note.
Devendra Nath Rai, 25.
Dhunput Sing, 7, 33, 35, 36.
Dhunput Sing Doogar, 67.
Digumbaree Dassea, 2.
Digumber Mitter, 65.
Dindoyal Lal, 48.
Dindoyal Pramanik, 52, 56.
Dinonath Pandy, 62.
Domanulla Sirkar, 15.
Doorga Doss Chatterjee, 62.
Doorga Mohtoon, 20.
Doyamoyee Chowdrainee, 63.
Dukhin Mohun Rai, 42.
Dwarkanath Chuckerbutty, 73.
Dyaram, 33.

E.

Elahee Bux, 6.
Erskine *v.* Dwarkanath Sing, 37.

F.

Fagan *v.* Chunder Kant Banerjee, 66.
Fitzpatrick *v.* Wallace, 13.

G.

Golam Khejur, 57.
Golam Ali, 38.
Golam Mahomed, 20, 22.
Gobind Chunder Bose, 90.
Goluckmonee Dabya, 65, note.
Gonesh Mondle, 14.
Gooroopprosad Sirkar *v.* Philippes, 54.
Gopeekisto Gosamee, 60.
Gopenunda Jha, 2.
Gosain Umur Narain, 62.

Gour Huree Sing, 14,16.
Gouree nath Rai, 42.
Grish Chunder Bose, 8.
Grish Chunder Dass, 23.
Gunga Dass Dutt, 88.
Gunga Narain Chowdhry, 32.
Gunga Narain Dass, 42.
Gyan Chunder Roy, 83.

H.

Haran Chunder Pal, 14.
Hora Mohun, 76.
Hari Prosonno Rai, 56.
Heeralall Seal, 83.
Heeralall Buxshee, 60.
Hills, 6.
Huree Mohun Mookerjee, 60.
Hurro Prosad Chowdhry, 29.
Hurree Nath Rai, 41.
Hurrish Chunder Koondoo, 2.
Huro Kishen Banerjee, 49
Hurro Mohun Mookerjee, 43, 65.
Huronath Rai, 63.
Huronondo Sheo, 63.
Huro Soondooree Chowdhrain, 33.
Hurree Pershad Malee, 21
Hurruck Sing, 10.
Hurryhur Mookerjee, 7, 59.

I.

Issen Chunder Dass, 8.
Isshur Ghose, 12.
Issur Chunder Dass, 9.

J.

Jadub Chunder Haldar, 30, 71.
James Hill *v.* Jhorie Ghose, 20.
Jan Ali, 85.
Jan Ali Chowdhry, 80.
Janokee Bullub Chuckerbutty, 37, note, 47.
Jaun Ali, 42.
Joba Singh, 36.
Jodoonath Paul, 60.
Jokee Lall, 87.
Joy Dheutt Jha, 14.
Joy Doorga Dabya, 54.
Joy Kissen Mookerjee, 53.
Joy Lall Sheik, 102.
Juggut Chunder Dutt, 34, 35.

K.

Kalee Churn Dutt, 6.
Kalee Dass Nundee, 57.
Kalee Kishen Biswas, 13.
Kalee Kishore Chatterjee, 13.
Kalee Mohun Chatterjee, 13, 41.
Kalee Pershad, 12, note.
Karoo Lall Thakoor, 16.
Kashee Dass Nundee, 57.
Kashee Nath Rai Chowdhry, 52.
Kashee Sing, 51.
Kazee Khuda Nawaz, 6.
Kearnes *v.* Bhowanee Churn Mitter, 57.
Kebul Kishore Dass, 57.
Keeroo Monee Dassee, 11.
Keneram Mullick, 7.
Kenny *v.* Jadub Chunder Rai, 66.
Khiros Monee Dassia, 11.
Khoda Buksh, 23.
Khoobaree Rai, 84.
Khoondkar Abdool Ruhman, 44.
Khoondkar Abdur Ruhman, 28.
Kisto Monee Dabya, 57.
Kisto Motee Dabya, 29.
Komola Sahoy, 80, note.
Komul Lochun Ray, 10.
Koolodeep Narain Sing, 36, 38.
Koolodeep Sing, 38.
Koylash Chunder Ghose, 66.

Kriteebash Mytee, 11.
Kumola Kant Ghose, 24.
Khussemuddeen Khoondkar, 39.

L.

Lakhan Magilla, 41.
Lala Jagut Narayan, 88.
Lala Jibun Lall, 64.
Lala Ratan, 64.
Limond, 37, note.
Luchmun Pershad, 3.
Luthecfunnissa Beebee, 11.

M.

Mahomed Aynuddeen, 34.
Mahomed Gazee, 51.
Mahomed Rohimoodeen, 63.
Mahomed Yacob, 6.
Mirza Nadir Beg, 14.
Miterjeet Sing, 6,10.
Modhoo Soodun Moozumdar, 62.
Modhoo Soodun Koondoo, 4.
Moharajah Ramnath Sing, 21.
Moharanee Indrajit Kooor, 52.
Moheem Chunder Dey, 33.
Mokhtakassee Dassia, 60.
Monmohenee Dassee, 4.
Monee Kurnika Chowdhry, 33.
Modhoo Soodun Singh, 69.
Moran & Co., 10.
Mothooranath Chatterjee, 30.
Muneeruddeen, 51.
Munsoor Ali, 50.
Mussamut Luteefun, 84.
Mussamut Moheen Koowar, 3.

N.

Netta Nunda Ghose, 46.
Nidhy Ram Sircar, 22.
Nilmoney Bonik, 84.
Nobin Chunder Rai, 51.
Nobin Kishen Mookerjee, 59.
Nobo Coomar Ghose, 60, 88.
Nobo Kanto Dey, 52, 70.
Nobo Kishore Bose, 41.
Nobo Kisto Mookerjee, 80.
Nodhee Dass, 20.
Noor Mohamed Mundle, 41.
Nuddea Chand Poddar, 51.
Nund Duntput, 75.
Nundo Lall Ghose, 54.
Nundun Lall, 73.
Nyamutulla Ustagur, 15.
Nymooddee Joardar, 41.

O.

Ooma Tara Dabya, 65.
Orjoon Sahoo, 24.

P.

Pandy Bishonath Roy, 9.
Paree Soondaree Dabya, 64.
Pelaram Kotal, 42.
Pirmanund Sein, 42.
Poddo Monee Dassia, 18.
Poolin Beharee Sen, 44.
Poulson *v.* Modhoo Soodun Paul, 61.
Pran Bundhoo Sircar, 84, note.
Prithee Ram Chowdhry, 31, note.
Prosono Moyee Dassee, 60.
Puddoo Monee Dassee, 67.
Punchanun Bose, 36.
Puran Sautra, 45, note.
Pureejan Khatoon 57.
Purna Chunder Rai, 2.

R.

Radah Mohun Mundle, 80.
Radhar Mohun Lushkar, 102.
Radhika Prosad Chatterjee, 67.
Rajah Sutt Surrun Ghosal, 90.

Raj Chunder Rai, 57.
Raj Kishore Mookerjee, 6.
Raj Mohun Mitter, 46.
Rakhal Dass Tewaree, 10.
Rakhal Dass Mookerjee, 74.
Ram Chunder Banerjee, 90.
Ram Coomar Bhuttarcharjea, 54.
Ram Coomar Dhara, 42.
Rameshur Audhikaree, 21.
Ramjeebun Bose, 29.
Ramjoy Mundle, 92.
Ramjoy Sing, 23.
Ramkant Chowdhry, 67.
Ramkant Dutt, 34.
Ram Kumar Mundle, 4.
Ram Lochun Goopto, 11.
Ram Mohun Ghose, 19.
Ramnauth Lall Bhaht, 8.
Ramnarain Nundee, 37, note.
Ramprosad Bhakut, 24.
Ramrutton Sirkar, 6.
Ranee Shornomoyee, 13, 39, 62, 68, 90.
Ranee Shornomoyee *v.* Rev. C. Blumhardt, 41, note.
Ranee Shurut Soondaree Dabya, 52.
Ras Monee Dabya, 25.
Ray Adyte Narain Singh, 17.
Romanath Dutt, 29.
Romanath Rukhit, 75.
Roshum Bebee, 45.
Rughu Nundun Thakoor, 69.
Run Bahadoor Sing, 57, 73.
Rung Lall Sahoo, 57.
Rushton, 30.

S.

Saduck Sirkar, 7.
Sahabuddeen, 90.
Sameena Bebee, 25.
Sarbanund Panda, 75.
Sarkies *v.* Kalee Coomar Rai, 88.
Saroda Proshad Rai, 80.
Saroda Soondaree Dabya, 51.
Savi *v.* Obhoy Nath Bose, 48.
Savi *v.* Chand Sirkar, 52 note.
Shadoo Sing, 41.
Sham Jha, 45, 46.
Sheeb Dyal Pundit, 17, note.
Sheik Afzul, 88.
Sheik Enayut Ulla, 50.
Sheik Golam, 31.
Sheik Mohcem, 18, 31, note.
Sheik Mohummed Shurullah, 68.
Sheik Peer Bux, 14, 53.
Sheik Rohmutullah, 4.
Sheoburn Lall, 7.
Sheodie Mahatoon, 20.
Shoshee Bhooshun Banerjee, 71.
Showdamonee Dassia, 43.
Skinner *v.* Rujab Ally Khan, 66.
Smith *v.* Mudun Lall, 71.
Solano *v.* Soobrun Rai, 73.
Sooklall Tewarie, 65.
Sooruth Soondaree Dabya, 26.
Sreemutty Ranee Moheema, 66.
Subhawatallah, 47.
Summeeruddeen Lushkar, 7.
Surrut Soondaree Dabya, 23, note.
Syed Jeshon Hossein, 21.
Syud Soojat Ally, 28.

T.

Tara Chand Dutt, 40, 90.
Tara Monee Koonwaree, 68.
Tarinee Kant Lahooric, 32.
Tarrucknath Mookerjee, 74.
Thakooranee Dassee, 5, 12, 13, 21, 42, 43, 28, note.
The Nawab Nazim, 29.

Thukree Rai, 102.
Troylucko Tarenee Dassya, 63.

U.

Unnoda Proshad Banerjee, 65, note, 66.
Umurto Lall Bose, 84.

W.

Watson & Co. *v.* Chota Joora Mundle, 9.
Watson & Co., 14, 36, 57, 60.
Wise *v.* Ram Chunder Bysack, 56.
Woody Chand Dutt, 23, note.
Woomakanto Sirkar, 13.
Woomanath Roy Chowdhry, 40.

Z.

Zaheeroodeen Paikar, 35.
Zumeeruddnissa Khanun, 25.

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THE

# LAW OF LANDLORD AND TENANT.

## ACT NO. VIII OF 1869.

PASSED BY THE LIEUTENANT-GOVERNOR OF BENGAL IN COUNCIL.

*(Received the assent of the Lieutenant-Governor on the 21st August, 1869, and of the Governor-General on the 15th October, 1869.)*

*An Act to amend the procedure in Suits between Landlords and Tenants.*

Preamble.

WHEREAS it is expedient to amend the procedure in suits between Landlords and Tenants in the Provinces subject to the Lieutenant-Governor of Bengal; It is enacted as follows :—

Interpretation of "Collector."

I. In the construction of this Act the word "Collector" shall include a Deputy Collector in charge of a Sub-Division or other officer exercising the powers of a Collector of a District or of a Deputy Collector in charge of a Sub-Division, by whatever designation such officer may be called.

Ryots entitled to a pottah.

Act X, 1859, Sec. 2.

II. Every ryot is entitled to receive from the person to whom the rent of the land held or cultivated by him is payable, a pottah containing the following particulars :—

The quantity and boundaries of the land; and where fields have been numbered in a Government survey, the number of each field.

The amount of annual rent.

The instalments in which the same is to be paid.

And any special conditions of the lease.

If the rent is payable in kind, the proportion of produce to be delivered and the time and manner of delivery.

Right of tenant to possession and quiet enjoyment.

When a ryot has received a lease from his landlord he has a right to demand that he shall be put into undisputed possession of the land leased to him; and if he is dispossessed of any portion, he is entitled to an abatement. "According to English law," observed Peacock, C. J., in a recent case, "if the land demised be evicted from the tenant, or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction; and if he is evicted from part, the rent is to be diminished in proportion to the land evicted; and it has been held that when a lessee is evicted by title paramount to that of his lessor, an apportionment of rent may take place in an action brought for the rent." *Gopenunda Jha*, 12, W. R., 109. The delivery of possession on the part of the landlord is ordinarily a condition necessary for the maintenance of an action for rent; and a landlord cannot sue upon a lease unless possession has been given. *Hurrish Chunder Koondoo*, 9, W. R., 582.

Limit to landlords implied guarantee against eviction.

But this obligation on the part of the landlord to place his tenant in possession, and secure him in the quiet enjoyment of the lands leased, extends only to guarantee the tenant against evictions and disturbances caused by himself, or any person claiming under him, or paramount to him; for it is "obvious to sound reason and common sense, that if one man demises property to another, he ought to take care that he has himself a right to that which he demises; and consequently, that no person claiming paramount to him, that is, by a title superior to his, shall interfere with the enjoyment of his tenant. But the case is quite different when somebody who has no title at all—some mere trespasser—thinks proper to interfere with the tenant's enjoyment. In such a case the law of the land vindicates the tenant's rights, and he is bound to resort to that law; and he may sue the wrong-doer without having recourse to his landlord, whom it would be unreasonable to expect to indemnify him against every wanton trespass committed by third persons. *Andrew's case*, *Cro. Eliz.*, 214; *Shep. Touch.* 166. Upon the whole, the law upon this subject may be summed up by saying, that the landlord, in the absence of express agreement, is under an implied obligation to indemnify the tenant against eviction or disturbance by his own act, or the acts of those who claim under or paramount to him; but not against the tortuous acts of third persons, for which the law of the realm affords the tenant a direct remedy against those who commit them." *Smith's Landlord and Tenant*, p. 210; *Purna Chunder Rai*, 1, Board's Rep., 138.

Tenant estopped from disputing his lessor's title.

It is a general rule of law that a tenant cannot dispute his landlord's title, *Digumbaree Dassea*, 2, *Board's Rep.*, 497; but this rule applies only to the lessor himself, and not to cases in which disputes arise between persons who claim to be the representatives

of such lessor. "According to English law," to quote the words of Peacock, C. J., "if a man takes land from another as his tenant, he is estopped from denying the title of that person. But if he takes land from one person, and afterwards pays rent to another, believing that other to be the representative of the person from whom he took the land, he is not estopped, in a suit for rent subsequently becoming due, from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took. For example, if a man pays rent to another, believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law, or that the landlord left a will, the tenant, in a suit for subsequent arrears, would not be estopped from shewing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to *primâ facie* evidence. It is like all *primâ facie* evidence liable to be rebutted." *Baney Madhub Ghose*, 6, W. R. (Act X.) 71, Full Bench It follows, therefore, that a tenant, though he cannot dispute his landlord's title, is not estopped from pleading that his landlord's title has expired.

Limitation to this rule.

It sometimes happens that a person, having only a limited interest in an estate, grants a lease beyond his own powers; in such cases, the lease holds good to the extent of the lessor's interests. In Bacon's abridgment leases (H) it is said, "though the 13, Eliz., C. 10, says that "all leases and grants made by any person or corporation therein mentioned shall be utterly void, and of none effect to all intents, constructions, and purposes; yet it hath been adjudged that a lease made by a Dean and Chapter against the said Statute shall not be avoided during the life and continuance of the Dean that made the lease; and the reason is given because the Statute is made for the benefit of the successors, that they should not be bound by those acts of their predecessors, which might turn to their prejudice and disadvantage, but not to give the Bishop power to derogate his own acts." *Anundolall Dass*, 11, W. R, (O. J.) 2. Thus a lease in perpetuity granted by a Hindoo widow, who has only a life interest in the property, is good for the widow's life-time, though void against those who have a reversionary interest in the estate. *Mussamut Mohun Koowar*, Marsh. Rep, 166.

Leases granted by lessors with limited interest in the land.

Binding upon lessor, but not upon reversionary.

Where a lease provides for the payment of the rent in kind, the proportion of produce to be delivered, and the time and manner of delivery are to be specified. If the tenant neglects to deliver the stipulated proportion of the produce at the time agreed upon, the landlord will be entitled to sue for damages estimated at the market value of the crop at the time when the produce should have been delivered. If after that time prices fall, the tenant has no right to inflict on the landlord a loss by giving him anything less than the equivalent of that, which he would have received, if the tenant had done his duty and handed over the Bhaolee rent when it became due. On the other hand the landlord has no right to make the tenant responsible for the possible profit which he might have made, if the grain had been delivered at the proper time. *Luchmun Pershad*, 11, W. R, 151, Norman, J.

Value of rent in kind how to be estimated.

Registration of leases.

All leases for any term exceeding one year must be registered under Act XX., 1866, Section 17; and according to Section 2 of the Act, a lease includes "a counterpart, a kabuliat, and undertaking to cultivate or occupy, and an agreement to lease." The registration of leases for a term not exceeding one year is optional (Section 18). A lease, which reserves an annual rent year by year, (সন বসন) is a lease for a term exceeding one year, and must be registered. *Ramkumar Mundle*, 2, B. L. R., 75. And it is important to remember that parole evidence is not admissible to prove an unregistered lease, the registration of which is by law compulsory. "When a party," it has been observed, "comes into Court resting his claim on a written title which the law requires to be registered, he cannot when he has failed to register, and is in consequence unable to use his title deed, turn round and say, I can prove my title by secondary evidence. It would be useless to have a compulsory Registration Act, if such a course were open to suitors." *Monmohenee Dassee*, 7, W. R., 112; *Sheik Rahmutullah*, 1, B. L. R., 58, (F. B.)

Stamp-duty chargeable on leases.

All leases, except leases granted to cultivators, are chargeable under Act XVIII., 1869, with the following rates of Stamp-duty:—Schedule 1, No. 19.

| | |
|---|---|
| *(a.)* Where the lease is expressed to be for a term of less than one year. | The Stamp-duty with which a Bond (No. 5) for the total amount payable under such lease is chargeable. |
| *(b.)* Where the lease is expressed to be for a term of not less than one year, but not more than three years. | The Stamp-duty with which a Bond for the total amount payable under such lease during the first year of the term is chargeable. |
| *(c.)* Where the lease is expressed to be for a term exceeding three years, or where no term is expressed. | The Stamp-duty with which a conveyance for the total amount payable under such lease during the first year of the term is chargeable. |
| *(d.)* Where the lease is granted in consideration of a fine or premium and where no rent is reserved. | The Stamp-duty with which a conveyance for the amount so paid is chargeable. |
| *(e.)* Where the lease is granted in consideration of a fine or premium, and also of a rent. | The Stamp-duty with which a conveyance for the amount of the fine or premium is chargeable, in addition to the Stamp-duty with which the lease would be chargeable in case no such fine or premium had been paid. |

The Stamp-duty chargeable upon Bonds is as follows:—Schedule 1, No. 5.

| | Rs. | As. | P. |
|---|---|---|---|
| When the amount secured does not exceed Rs. 25 ... | 0 | 2 | 0 |
| When such amount exceeds Rs. 25, but does not exceed Rs. 50 ... ... ... ... | 0 | 4 | 0 |
| When such amount exceeds Rs. 50, but does not exceed Rs. 100 ... ... ... ... | 0 | 8 | 0 |
| For every Rs. 100 or part thereof in excess of Rs. 100 up to Rs. 1,000 ... ... ... | 0 | 8 | 0 |
| For every Rs. 500 or part thereof in excess of Rs. 1,000 up to Rs. 10,000 ... ... | 2 | 8 | 0 |

| | Rs. | As. | P. |
|---|---|---|---|
| For every Rs. 1,000 or part thereof in excess of Rs. 10,000 up to Rs. 30,000 ... ... | 2 | 8 | 0 |
| And for every Rs. 10,000 or part thereof in excess of Rs. 30,000... ... ... ... | 12 | 8 | 0 |

The following are the rates of Stamp-duties chargeable for conveyances :—Schedule 1, No. 15.

| | Rs. | As. | P. |
|---|---|---|---|
| When the amount paid or secured does not exceed Rs. 50 ... ... ... ... | 0 | 8 | 0 |
| When such amount exceeds Rs. 50, but does not exceed Rs. 100 ... ... ... | 1 | 0 | 0 |
| For every Rs. 100 or part thereof in excess of Rs. 100 up to Rs. 1,000 ... ... ... | 1 | 0 | 0 |
| For every Rs. 500 or part thereof in excess of Rs. 1,000 up to Rs. 10,000 ... ... | 5 | 0 | 0 |
| For every Rs. 1,000 or part thereof in excess of Rs. 10,000 up to Rs. 30,000 ... ... | 5 | 0 | 0 |
| For every Rs. 10,000 or part thereof in excess of Rs. 30,000 up to Rs. 1,00,000 ... .. | 50 | 0 | 0 |
| For every Rs. 20,000 or part thereof in excess of Rs. 1,00,000 ... ... ... ... | 75 | 0 | 0 |

Under the interpretation given in the Stamp Act, Section 3, Clause 15, "a lease includes any instrument (not being a counterpart) of which one person, lets or agrees to let, or takes or agrees to take, immoveable property to, or from another." And Section 6 provides that in the absence of an agreement to the contrary, the expense of providing the proper Stamp shall be borne in the case of a lease by the lessee. But a "lease granted to a cultivator, unless a fine or premium be paid in consideration of such lease," is exempt from Stamp-duty. Act XVIII., 1869, Section 15, Clause 9.

Act X., 1859, Sec. 3.

Ryots holding land at fixed rates to receive pottahs.

III. Ryots who, in any Province to which this Act may apply, hold lands at fixed rates of rent, which shall not have been changed from the time of the Permanent Settlement of such Province, are entitled to receive pottahs at those rates.

Fixed rates of rent.

By the term "fixed rates of rent," to quote the decision of Peacock, C. J., in the celebrated case of *Thakooraneo Dassee*, "is meant, not merely fixed and definite sums payable as rent, but also rates regulated by certain fixed principles. Such, for instance, as a certain proportion of the gross or of the net produce of every biggah, or such a sum of money as would be equal to such a portion of the produce, or such a sum as would give to the ryot any fixed rate of profit after payment of all the expenses of cultivation. *Id certum est quod certum, reddi potest* is a maxim of law." 3, W. R., (Act X.) 108. In a subsequent case, it was held by Trevor and E. Jackson, J.J., that no rate of Bhaolee rent, varying yearly in amount with the varying amount of the gross produce of the land, though fixed as to the proportion which it is to bear to such produce, is a fixed unchange-

able rent of the nature alluded to in this Section. Bayley, J., dissented, holding that "a contract to pay half in kind did not involve a varying rate, being as much a fixed contract as if it were to pay a half of Rs. 100 or any other sum." *Mahomed Yacoob*, 4, W. R., (Act X.) 23. The weight of authority seems to be in favour of the view adopted by the Chief Justice and Mr. Justice Bayley. Act XI., 1859, Sec. 37, when speaking of ryots who cannot be ejected by an auction-purchaser, places in the same category those who have a right of occupancy at a fixed rent, and those who hold at rates assessable according to fixed rules. And in a very recent case, it was held that an arrangement by which a certain rent in cash is to paid in lieu of rent in kind, does not shew a variation in the rate of rent, but is tantamount to saying that the money rate represents and is equivalent to what was before paid in another way. *Miterjeet Sing*, 12, W. R., 14. Similarly, the change of Sicca Rupees into Company's Rupees does not alter the fixity of the rate. *Kallee Churn Dutt*, 1, W. R., 248. Nor does a trifling difference in the jumma necessarily affect the fact of an uniform payment. *Elahee Bux*, 7, W. R., 284. Thus a reduction in the jumma of one anna and three pie was held to be merely a nominal variance, not sufficient to alter the fixed character of the holding. *Ramrutton Sirkar*, 2, W. R., (Act X.) 74. And where a number of jummas, which have been held at fixed rates, are consolidated into one holding, the fixity of the rent is not affected by the consolidation. *Kazee Khuda Nawaz*, 5, W. R., (Act X.) 53. "This principle applies equally to jummas which have been derived in part or in whole with the consent of the landlord, and which are subsequently consolidated into one jumma. The presumptions of Section 4, Act X., 1859, are not restricted to holdings, but refer simply to the fact that land has been held by a ryot at a rent which has not been changed for a period of 20 years before the commencement of the suit." *Raj Kishore Mookerjee*, 10, W. R., 117, Kemp and E. Jackson, JJ. In the same way the sub-division of a holding does not necessarily destroy the continuity of the tenure in respect to the rate of rent. The question in such cases is, whether "the rate of rent paid for each biggah has remained unchanged for the period prescribed by law?" If it has, that rate cannot be altered. The Zemindar, by consenting to a sub-division of, addition to, or substraction from, the total holding of the ryot, does not destroy the continuity of the tenure in respect of the rate of rent, and the rent paid for each biggah of land. It is undoubtedly true that the Zemindar might refuse to consent to a sub-division of the tenure, or to a contraction of the holding, and might say,—"I will hold the whole tenure responsible for the whole rent;" but this is not the question in this case. *Hills*, 3, W. R. (Act X.) 135, Trevor and Campbell, JJ. Similarly, the division of a ryot's tenure among his heirs does not destroy the continuity of the holding, and as long as the entire rent is paid by their joint contributions the old holding will be preserved; but the entire holding will be vitiated if one of the joint tenants makes default. *Hills*, 1, W. R., 10. When a tenant holding land which had paid an uniform rent since the Permanent Settlement, relinquished a portion of his holding, and received a fresh pottah from his landlord, in which a deduction was made for the relinquished land, it was held that the fixity of rent for

Not affected by the consolidation of several jummas into one.

Nor by Sub-division of a jumma.

the remaining portion was not affected by the arrangement. The pottah was merely the confirmation of the tenancy already existing. *Keneram Mullick*, 2, W. R., (Act X.) 17. In the same way an increase in the rent on account of additional lands is not an increase in the rates of rent. *Summeeruddeen Lushkar*, 2, W. R., 93.

Date of Permanent Settlement.

But the tenant must not only have held at fixed rates, but he must shew that the rates have not changed since the time of the Permanent Settlement. By the Permanent Settlement is meant the Permanent Settlement of Bengal, Behar, and Orissa, which was sanctioned in 1793, and not the Permanent Settlement of any particular estate which was afterwards made. *Sheoburn Lall*, 3, W. R., (Act X.) 20.

Holding from Permanent Settlement secure against auction-purchaser.

When a ryot has held at a fixed rent from the time of the Permanent Settlement he is entitled to demand a pottah at the fixed rate at which he has held, and his rent cannot be enhanced even by an auction-purchaser at a sale for arrears of revenue. *Saduck Sirkar*, 5, W.R., (Act X.) 16. The ryot is equally protected, whether the sale of the estate was made under the former sale law, Act I., of 1845, or the existing law, Act XI., 1859. Under Act I., 1845, Section 26, a tenure was only secure from enhancement when it had been held at a "fixed rent more than 12 years before the Permanent Settlement"; but this has been modified by Section 1, Act X., 1859, which says, that such parts of Section 26, Act I., 1845, as relate to the enhancement of rents and the ejectment of tenants by the purchaser of an estate sold for arrears of Government Revenue, are declared subject to certain modifications: one of which is that contained in Section 3, *viz.*, that a ryot who has held at a fixed rate of rent, which has not been changed from the time of the Permanent Settlement, is entitled to receive a pottah at that rate (1.) *Hurryhur Mookerjee*, 7, W. R., 176, Full Bench.

But not if the rent has changed.

But a tenant who has held land since the Permanent Settlement, but at a varying rate, acquires no right under this Section; his position is in no respect superior to an ordinary ryot, with a right of occupancy; and consequently he is only entitled to a pottah at fair and equitable rates. *Dinobundoo Dey*, 9, W. R., 522. It is almost unnecessary to observe that this Section applies only to ryots, and not to tenants intermediate between the proprietor and the ryots. The latter class of tenants fall under the provisions of Section 16 of this Act. *Dhunput Sing*, 2, Board's Rep., 81. In deciding cases under this Section, it is only necessary to consider whether the ryot has held at a fixed rent, and from the Permanent Settlement. "The right of exemption from enhancement is founded upon the simple fact of the land having been held at a fixed rate of rent from the time of the Permanent Settlement. When it has been proved that the land has been so held, no further question arises as to whether it was so held under an *istumraree* or *mokururee* pottah, or whether the person claiming the right to enhance is an auction-purchaser or not. Sections 3 and 4 of Act X. make no mention of the nature of the pottah under which the land has been held, or of the right under which a fixed rent has been paid without alteration, but exempt from assessment lands which have been held at fixed rents from the time of the Permanent Settlement. The presumption required to be made is not that the land has been

If land has been held at a fixed rent from Permanent Settlement, the nature of the holding need not be considered.

(1.) All modifications introduced by Act X., 1859, are still in force. *Vide infra.* Section 107.

held by the ryot and his ancestors, or by him and the persons who had power to alienate it to him, but simply that it has been held at a fixed rent." *Ramnath Lal Bhaht*, 1, Board's Rep., 169, Peacock, C. J.

Act X., 1859, Sec. 4.

Presumption if rent of land be not changed for 20 years.

IV. Whenever, in any suit under this Act, it shall be proved that the rent at which land is held by a ryot in any such Province has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the time of the Permanent Settlement, unless the contrary be shewn, or unless it be proved that such rent was fixed at some later period.

A ryot who relies upon a pottah which he fails to prove, can fall back upon this presumption.

In the case of *Gresh Chunder Bose*, the defendant pleaded that his rent was not liable to enhancement, as he had held at an uniform rate under a pottah from a time anterior to the Decennial Settlement. The pottah was dated 1192, and was rejected by the Court as not proved; and the question arose whether a defendant, whose pottah had been pronounced unproved, was at liberty to claim the benefit of the presumption which arose from an uniform payment of 20 years. As there were conflicting decisions on the subject, the point was referred for the decision of a full bench, and it was finally decided that a ryot was not precluded from the benefit of his having held at a fixed rate of rent which had not been changed from the date of the Permanent Settlement, or of any presumptive evidence to that effect, merely from the fact of his stating that he held under a pottah not inconsistent with that presumption, though he might fail to prove the pottah. 6, W. R., (Act X.) 58.

Even if the pottah is pronounced a forgery.

The case of *Issen Chunder Dass*, 6, W. R., (Act X.) 70, goes rather beyond this. In that case the defendant, as a bar to enhancement, set up a *mokururee* pottah, which was pronounced a forgery; and as he had relied on forged documents to support his case, it was contended that he could not fall back upon the presumption of an uniform payment for 20 years. The Court, however, held that no law empowered a Court of Justice to punish the defendant for the crime of forgery by refusing him a right which the law had given him as a tenant. "It is quite clear," said Peacock, C. J., "that, if a ryot sets up a *mokururee* pottah as an answer to the landlord's claim to enhance his rent, and the ryot fails to prove the pottah, or the pottah produced by him is held to be forged, the landlord is not necessarily entitled to enhance the rent to the full amount claimed, he is entitled only to a fair and equitable rate, having regard to the grounds of enhancement. A ryot might purchase a holding, or come to it by descent, and might receive with the land a *mokururee* pottah, and believing it to be genuine, might set it up as an answer to a claim to enhance his rent. It would be very unjust, under such circumstances, to hold that his rent might be enhanced to the amount claimed by the land-owner, however exorbitant it might be. But when a ryot sets up a *mokururee* pottah which he knows to be

forged, he is liable to be punished criminally for using as a genuine document that which he knows to be false. But it does not entitle the land-owner to enhance the rent beyond a rate which is fair and equitable. The crime of the ryot cannot entitle the land-owner to more than his just rights." *Issur Chunder Dass*, 6, W. R., (Act X.) 70. The law, therefore, upon this subject may now be considered to be settled, and a *defendant* whose alleged *mokurureo* pottah is pronounced a forgery, may fall back upon the presumption which an unchanged rent for 20 years confers.

But the presumption only applies to cases in which the relation of landlord and tenant exists.

When, however, a ryot sets up an adverse proprietary title to his landlord, which he fails to establish, he is not entitled to the benefit of the presumption. In the case of *Pandy Bishonath Roy*, the defendant pleaded that he was a jageerdar; but being unable to prove his jageer title, he was not allowed to fall back upon any right which he might have acquired from any lengthened occupation of the land. "A party," the Court observed, "may have subordinate rights awarded when they *arise out of the principal right which he pleads*. But when a party pleads distinctly a jageerdar's proprietary right against a malik's proprietary right, a Court cannot award a subordinate right of occupancy, which in no way arises out of a jageerdar's proprietary right, but out of a regular right never pleaded by defendant, and, in fact, incompatible with defendant's case." 7, W. R., 145, Bayley and Shumbonath Pundit, JJ. In other words, where a defendant has held as a trespasser, and not as a ryot, he cannot claim the benefit of the presumption which the law makes in favour of ryots.

The pleadings must be consistent with the fact of holding from Permanent Settlement.

When a defendant wishes to avail himself of the benefit of the presumption of an unchanged rent for 20 years, he must take care that there is nothing in his pleadings which is inconsistent with a holding from the time of the Permanent Settlement. Thus, in *Watson and Co.* vs. *Chota Joora Mundle*, the defendant set up a pottah which had been granted in 1212 at a rent of Rs. 12 per annum, and alleged that he had been in possession more than 57 years at that rent, but did not plead possession from the time of the Permanent Settlement; it was held by the Court that the defence itself rebutted the presumption. "Section 4," observed Peacock, C. J., "makes the payment of rent for 20 years, without alteration of the amount, presumptive evidence that the land has been held at that rent from the time of the Permanent Settlement; and unless the presumption is rebutted, the ryot is entitled by Section 3 to a pottah at that rate, and his rent, consequently, cannot be enhanced. But in this case the defendant did not rely upon the fact that the land had been held at a rate of rent which had not been changed from the time of the Permanent Settlement, but upon a pottah alleged to have been granted in 1212, long after the Permanent Settlement. His own defence rebutted the presumption; and although he failed upon the ground that the pottah was not a genuine one, he never alleged, in his answer, that the rent of Rs. 12 had been paid from the time of the Permanent Settlement, as he ought to have done if he intended to rely upon that defence." Marsh. Rep., 68. At the same time it is not absolutely necessary that occupation from the time of the Permanent Settlement should be actually pleaded, provided there is nothing in the defendant's answer inconsistent with such fact. When "the ryot tenders proof and succeeds in proving that

he has paid rent at one uniform rate for 20 years, then the presumption imperatively arises, unless the contrary be shewn, that the rent has been unchanged from the time of the Permanent Settlement: and upon that presumption so arising the defendant is entitled to the whole legal consequences of that state of things. If the tenant succeeds in proving that he has held at one uniform rate for 20 years, then the Court is bound to go on, and presume that the land has been held at that rent from the time of the Permanent Settlement." *Rakal Dass Tewaree*, 7, W. R., 242, L. S. Jackson, J. *See* also *Hurruck Sing*, 11, W. R., 84. In the case of *Poolin Beharee Sein*, the defendant did not expressly plead that he had held at a fixed rate from the time of the Permanent Settlement, but stated that he had paid an uniform rent since 1829. This answer the Court held in no way rebutted the presumption. "The defendant," observed Norman, J., "stated his title as well as he could, alleging payment of rent at an uniform rate from 1829, nearly 40 years ago, as far, no doubt as his recollection can go, and says in effect,—"I claim the presumption that the rate was fixed from an earlier period;" that is to say, from a time prior to the Permanent Settlement. 7, W. R., 472. It must be observed in this case that the defendant did not plead that his tenancy *commenced* in 1829, but merely produced proof to shew that he had paid an uniform rent since 1829; and the Court inferred from the particular facts of the case that he meant to plead that his tenancy dated from the time of the Permanent Settlement. Thus, when a ryot pleads that he and his family have held certain lands from generation to generation, and claims the benefit of the 20-years' presumption, he will be supposed to have dated his claim from the time of the Permanent Settlement; but where a tenant fixes some particular date, as the one from which his tenancy commenced, no matter how remote that may be, if subsequent to the Permanent Settlement, he cannot claim the benefit of the presumption arising under this Section. *Miterjeet Sing*, 12, W. R., 14.

Proof necessary to establish the presumption.

In establishing the presumption of an unchanged rent for 20 years, it is not absolutely necessary that the defendant should show actual payment for every separate year. "An uniform payment may be proved by evidence very much short of the production of the receipts for each and every year during such period." *Komul Lochun Ray*, 7, W. R., 417, Norman, J. Nor is it necessary that the ryot should shew that he has paid the exact amount of rent in each year. "The varying amounts of rent paid by the defendant in each year are not inconsistent with the uniformity in the amount of payment required by law to warrant the presumption. It is not uniformity in the amount actually paid that is required to raise the presumption, but only uniformity in the rate agreed upon." *Moran and Co.*, 7, W. R., 35, Trevor and E. Jackson, JJ. It is, of course, impossible to lay down any precise rule as to the amount of evidence that is required to raise the presumption. The circumstances of each case differ, and the defendant must give such evidence as will reasonably satisfy the Court that the land has been held at an unchanged rent. In one case the deposition of the defendant, and the evidence of a single witness was held sufficient, but the High Court observed, that in suits for enhancement, it would not generally be sufficient for the ryot to swear that he had paid rent at

a uniform rate for more than 20 years; but that he should prove such payments by *dakhilas*, or other good independent evidence. *Hurro Chunder Mookerjee*, 5, W. R., 89.

Evidence required to prove receipts.

In proving receipts it is not, of course, expected that the ryot will summon every agent of his landlord who may have given him receipts, but he must give *primâ facie* evidence to shew that they are genuine documents. If a ryot produces *dakhilas*, and swears that he received them from the land-owner or his agent, or gives other *primâ facie* evidence of their genuineness, and the landlord or his agent does not come forward and deny them, or give evidence to shew that they are not genuine, they may be taken as *primâ facie* evidence against him, if the evidence of the ryot is believed. *Kriteebash Mytee*, 7, W. R., 526, F. B. Peacock, C. J.

A break in the holding rebuts presumption.

In rebutting the presumption arising from a 20-years' holding, the landlord must shew either that the rent has been changed; or that the rent was fixed subsequent to the Permanent Settlement. A break or an interruption in the holding of the land would be sufficient to rebut the presumption: but if a ryot holding at a particular rent was unlawfully evicted, he would not necessarily cease to hold at that rent. "Eviction, though it would put an end to the ryot's possession, would not destroy his holding: and therefore if the ryot is restored to possession, he is restored to this original holding, if that holding would not have ceased to exist but for the eviction." *Lutheefunnissa Beebee*, Suth. F. B. Rul., 91, Peacock, C. J., Bayley and Kemp, JJ.

But not if tenant has been unlawfully evicted.

Value of jumma *wasil bakee* papers as evidence.

In another case, where the ryot proved a uniform payment for 20 years, it was held that the presumption was not rebutted by the omission of all mention of the holding in certain jumma *wasil bakee* papers produced from the office of the Canoongoe and dated 1229. *Ram Lochun Goopto*, 6, W. R., 95. The value to be attached to jumma *wasil bakees*, and Canoongoes papers as proof on the part of the plaintiff in rebutting the presumption of an uniform rent was discussed by Norman, J., in the case of *Keeroo Monee Dassee*, 7, W. R., 533. "A jumma *wasil bakee*," it was said, "might be admissible, under Section 42, Act II., 1855, as a book regularly kept in the way of business, but as such it would be corroborative and not independent proof of the facts stated therein. Very possibly the paper may be made evidence. The writer of it may be produced. Refreshing his memory from the paper, (*see* Sec. 45) he might be able to state what rent the defendant paid in the year in question; and then to corroborate his testimony, the paper may be put in under Section 43. If it is proved that the writer is dead and cannot be found, the document may be put in as an entry made in the ordinary course of business under Section 39, Act II., 1855. As to the Canoongoes papers, it is not stated that the estate was held khas or under attachment in 1227: and if not, it is probable that the entries in the Canoongoes papers are not evidence against the defendant. If they simply give the rate of rent, they will probably have been made from mere hearsay in the first instance." *Kheros Monee Dassia*, 7, W. R., 533.

Value of Canoongoes papers.

The presumption only applies to ryot.

It must be remembered, that it is only ryots who can claim the benefit of the presumption under this Section. Thus, where several joint owners by arrangement among themselves permit one of their number to hold a portion of the joint property, paying a sum to the others, this arrangement does not convert the occupier into a ryot holding land

at a particular rate of rent. It is a temporary arrangement among the joint owners of a particular time, and cannot, either in conjunction with or without a further holding, such as is here shewn, be a basis for the presumption mentioned in this Section (1.) *Boghoban Tewarie*, 2, W. R., 92, Morgan and Shumbonath Pundit, JJ.

We have seen in the cases cited under the previous Section that the fixity of the rent was not necessarily effected by the consolidation of a number of jummas into one, or by the sub-division of a holding among the heirs of a deceased tenant. In the same way, where additional land has been added to the jumma, a small increase in the rent to the extent of the additional land will not deprive the ryot of the benefit of the presumption (2.)

Act X., 1859, Sec. 5.

Ryots having right of occupancy, but not holding at fixed rates, to receive pottahs.

V. Ryots having rights of occupancy, but not holding at fixed rates as described in the two preceding Sections, are entitled to receive pottahs at fair and equitable rates. In case of dispute, the rate previously paid by the ryot shall be deemed to be fair and equitable, unless the contrary be shewn in a suit by either party under the provisions of this Act.

A ryot with a right of occupancy is entitled to hold his land upon paying a fair and equitable rent. The law presumes that the rent at present paid is fair and equitable, and this rent cannot be enhanced except after service of a notice under Section 14, and upon one of the grounds stated in Section 18. *Isshur Ghose.*, Suth. F. B., Rul. 153, and *Thakooranee Dassee*, 3, W. R., (Act X.) 110, Peacock, C. J.

The question of what is a fair and equitable rent for occupancy ryots to pay will be further discussed under Section 18, when we come to speak of the grounds upon which the rents of occupancy ryots can be enhanced.

Act X, 1859, Sec. 6.

Right of occupancy of ryot cultivating or holding land for 12 years.

VI. Every ryot who shall have cultivated or held land for a period of 12 years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same; but this rule does not apply to *Khamar*, *Neej-jote*, or Seer land belonging to the proprietor of the estate or tenure and let by him on lease for a term, or year by year, nor (as respects the actual cultivator) to lands sub-let for a term, or year by year, by a ryot having a right of occupancy. The holding of the father or other person from whom a ryot

(1.) But where a sharer holds land in excess of his own share, he is, *quoad* the excess land, a tenant of his co-sharers, and can be sued like an ordinary ryot for rent. *Kalee Pershad*, 12 W. R., 418.

(2.) *Vide ante* page 6.

inherits shall be deemed to be the holding of the ryot within the meaning of this Section.

The Section retrospective in operation.

This Section is retrospective in its operation; so that ryots who had cultivated or held land for 12 years before the passing of Act X. of 1859, became occupancy-ryots as soon as that Act came into force. *Thakooranee Dassee*, 3, W. R., (Act X.) 29, (F. B.) I tis some times difficult to draw a distinction between a ryot with a right of occupancy and a middle-man: for occupancy does not necessarily imply cultivation. In one respect an occupancy-ryot differs little from a middle-man; he can sub-let the whole of his land without in any way forfeiting his own rights, or conferring any rights of occupancy on the sub-lessee. *Kalee Kishore Chatterjee*, 9, W. R., 344. In such cases it is always difficult to determine the status of a ryot. In one case it was held that in deciding whether a tenant is an occupancy-ryot or a middle-man, we should look to the origin of the holding; and if a tenancy when first created was clearly a ryottee tenancy, that no subsequent arrangement which the original cultivator might make with sub-lessees would deprive him of his occupancy rights. *Karoo Lall Thakoor*, 7, W. R., 15 (1.)

Distinction between occupancy-ryot and middle-man.

Occupancy only acquired in land used for agriculture.

But the land must be used for agricultural purposes, otherwise no right of occupancy is acquired. Thus, it was held that a tenant who had obtained a plot of ground for building a house, obtained no rights of occupancy in the land. "The occupation," observed Phear, J., "intended to be protected by this Section, is occupation of land considered as the subject of agricultural or horticultural cultivation, and used for purposes incidental thereto, such as for the site of the homestead or the dwelling-house of the mali." *Kalee Kishen Biswas*, 8, W. R., 251. Similarly, no right of occupancy is acquired in land used for the erection of a school or a church, *Ranee Shornomoyee*, 9, W. R., 552; or for building purposes. *Kalee Mohun Chatterjee*, 11, W. R., 183. But where a tenant, who was a breeder of horses, had occupied land for grazing, it was held that he had acquired a right of occupancy in it. *Fitzpatrick* vs. *Wallace*, 11, W. R., 231. There can, however, be no right of occupancy in anything but land: a ryot who has held a julkur for a number of years, obtains no right of occupancy in it. *Woomakanto Sirkar*, 2, W. R., (Act X.) 19.

A right of occupancy hereditary, but not necessarily transferable.

A right of occupancy is an hereditary right, but it is not necessarily a transferable right. It was not the intention of the Legislature, when passing Act X., 1859, to alter the nature of a jote, and convert a non-transferable jote into a transferable one, merely because a ryot had held it for 12 years, and thereby acquired a right of occupancy. *Ajoodhya Pershad*, 7, W. R., 528, (F. B.) In another case it was said that, though the law recognised the holding of the father, or other person through whom the ryot inherits, as the holding of the ryot, it does not recognise the right of a transferee to be identical with that of the transferer (2.) It is only when occupancy is inherited that the occupancy of the predecessor is considered as the occupancy of the tenant in possession. Unless, therefore, the tenant held a transferable

(1.) *Vide infra*. page 16, where the correctness of this decision is discussed.

(2.) See the concluding remarks under this Section, in which I have discussed the question of whether the law makes any distinction of the sort.

tenure, the sale by him of his jote to another party, without the consent of the landlord, would not transfer to the purchaser any right of occupancy which the seller might have possessed, or enable the present occupant to plead that the period of his own possession joined to that of the former tenant gave him a prescriptive right of occupancy. *Watson and Co.*, 7, W. R., 395, Loch and Macpherson, JJ. But a transfer which had been recognised by the landlord would be valid. *Chunder Cowar Rai*, 6, W. R., 190. At the same time it must be remembered that an occupancy-ryot does not by sub-letting transfer his right of occupancy. The law recognises the right of a ryot having a right of occupancy to sub-let the lands which he holds, although the ryot holding under him does not gain a right of occupancy as against him. *Haran Chunder Pal*, 1, B. L. R., 81.

An occupancy-ryot can sub-let.

Under what circumstances a right of occupancy can be acquired in *Neej-jote* land. *Neej-jote* passes to purchaser on sale of Zemindaree.

In the same way, a ryot who cultivates *Neej-jote* land belonging to the proprietor of an estate acquires no right of occupancy against his landlord, if the land is leased to him for a term, or year by year; but he does acquire a right of occupancy where it has not been so leased to him. *Gour Huree Sing*, 12, W. R., 278. I may here remark that when a Zemindaree is sold, *Neej-jote*, like other land, passes to the purchaser. A Zemindar cannot plead that it is not included in the purchase, on the ground that he has a right of occupancy in it. *Joy Dutt Jha*, 7, W. R., 40.

A ryot who relies on a pottah, which he fails to prove, can plead a right of occupancy.

We have seen in the cases quoted under Section 4, that where a defendant has relied upon a pottah which he has failed to prove, that he is still entitled to fall back upon the presumption which a 20-years' tenancy conveys. In the same way under this Section, a defendant whose pottah has been rejected, is still entitled to show that he has held for 12 years, and thereby acquired a right of occupancy. *Bydnath Shaha*, 3, W. R., 208. But a ryot cannot claim any rights under this Section when he sets up a title hostile to his landlord, "such an act amounting to a disclaimer and forfeiture of all his rights of occupancy." *Mirza Nadir Beg*, 2, W. R., (Act X.) 2, Norman and Shumbonath Pundit, JJ.

Trespasser cannot claim rights of occupancy.

This Section applies merely to ryots who pay rent for the land they hold or cultivate; and when a person, by his own confession, does not fall within the category of a ryot, he cannot claim a right of occupancy. Thus, "occupation as a trespasser, or cultivation by a trespasser, could not confer a right under this Act, and could not be taken into account in considering whether a person had occupied as a ryot for 12 years." *Sheik Peer Bux*, Suth. F. B. Rep., 146, Peacock, C. J., Bayley and Kemp, JJ.; *Gonesh Mondle*, 2, W. R., (Act X.) 85.

Questions discussed. 1*st*.—Is a right of occupancy transferable by inheritance, or transferable by inheritance and sale?

I cannot conclude my remarks under this Section without observing, with great submission, that the law relating to the right of occupancy has been somewhat misinterpreted and misunderstood. It seems to be taken for granted that the right of occupancy is transferable by inheritance, but in no other way. With all submission, I maintain that the law makes no such distinction. It would indeed be strange if the law allowed transfers after a man's death, which it did not permit in his life-time. A tenure must be transferable in all cases, or not at all. If a landlord is entitled to object to a transfer by purchase, he must equally be entitled to object to a transfer by inheritance. If he can refuse to recognize the purchaser, he must be equally entitled to

refuse to recognize the heir. The question is, does the law make any distinction between the two cases? I think not. Section 6 says, that "any ryot who shall have cultivated or held land for a period of 12 years, shall have a right of occupancy in the land so cultivated or held by him;" and it is added that "the holding of the father, or other person from whom the ryot inherits, shall be deemed to be the holding of the ryot within the meaning of this Section." The clear meaning of this is, that in computing the period of 12 years, the ryot who succeeds to his father's land shall be permitted to reckon the period of his father's occupation as his own. The Section does not refer to cases in which occupancy rights have been acquired; it merely lays down the conditions under which they are to be acquired. The law is absolutely silent as to the manner in which these rights, when once acquired, are to be transferred. If occupancy rights are not transferable by purchase, there is nothing in the law to make them transferable by inheritance.

Speaking from the limited experience I possess of several districts in Bengal, I should say that a right of occupancy was transferable by purchase and inheritance alike. Local custom in such a matter supplements the law. There is not a district in which I have resided, in which ryots' holdings are not daily sold by the Courts in execution of decrees; and no objections, as far as I am aware, have ever been made by the Zemindars to these sales. It has even been held—*Nyamutulla Ustagur*, 6, W. R., (Act X.) 40—that an occupancy-ryot can build a *pucka* house upon the land even if the Zemindar objects; and it would, indeed, be hard if he were not permitted to leave this house to his children, or dispose of it by sale.

I have said that the law makes no distinction between transfers by inheritance and transfers by sale. If a ryot's jote is transferable by inheritance, my contention is that it must equally be transferable by sale. If a transfer can be made without the Zemindar's consent, it matters not whether it is made by inheritance or sale. Now, it is admitted, and rightly admitted, that a right of occupancy can be inherited. If a right of occupancy could not be inherited, all rights in the land which a ryot possessed would die with him. No ryot could succeed to the rights of his father; each man would have to acquire *de novo* rights of occupancy for himself. There could in that case be no holding from the time of the Permanent Settlement, for no ryot could go further back than the commencement of his own tenancy. I need hardly say that any such construction would be opposed to existing practice and the clear intention of the law. Fathers daily transmit their holdings to their children, and if they are able to do this, it surely follows that they have the power of transferring them by sale to strangers. I say it follows, because if we admit that a holding is transferable at all, we have no right, in the absence of an express enactment of the law, to say that it is transferable in one way and not in another. In my opinion, therefore, the Courts are bound to presume that occupancy rights are transferable by sale, unless the contrary is shown.

*2nd.*—Does a lease for a fixed term in the absence of an express stipu-

There is another point in which, as it appears to me, this Section seems to be misunderstood. It has been held in several cases that ryots who hold under fixed leases can acquire no right of occupancy in the land. *Domunulla Sirkar*, 11, W. R., 556. If we look at Section

lution bar a right of occupancy?

6, we shall see that there is a distinction made between land let out generally to ryots, and *Khamar*, *Neej-jote*, or Seer land, belonging to the proprietor of the estate. In the first case, a ryot who has held for 12 years, acquires a right of occupancy whether he has held under a pottah or not; in the second case, he does not acquire the right if the land has been leased to him for a *term*, or *year by year*. The law clearly makes a distinction between the two cases; and it is only when a ryot cultivates *Khamar*, and *Neej-jote* land, that a lease for a term, or year by year, necessarily bars his right of occupancy. The object of the Legislature in making this distinction is obvious. *Khamar* or *Neej-jote* land, is land which the Zemindar presumably keeps for his own cultivation; and even if circumstances compel him to let it out for a few years to ryots, he is still supposed to have reserved to himself the right of taking it back again into his own occupation. But there is no necessity to make any such reservation in the case of land which the Zemindar has never cultivated, and has no intention of cultivating, and the law therefore grants to a ryot who holds such land for 12 years, whether by lease or otherwise, a right of occupancy in it.

*3rd.*—Ought not an occupancy-ryot, who permanently leases out his land to under-tenants, to be treated as a middleman?

It is worthy, too, of observation, that the ryot of an occupancy-ryot, like the ryot who cultivates *Neej-jote* land, acquires no right of occupancy, if the land is only let to him "for a term, or year by year; and from the analogy of the case of *Gour Huree Sing*, 12, W. R., 278 (1,) it would follow that the tenant of an occupancy ryot does acquire a right of occupancy when he is neither a term nor a yearly tenant. Now two persons cannot have a right of occupancy in the same land; and it seems therefore to follow that an occupancy-ryot, who leases out his land permanently to under-tenants, forfeits his own rights of occupancy, and becomes, instead of a cultivator, the holder of an intermediate tenure, which he is bound to register in the Zemindar's Sheristah. So long as a ryot with a right of occupancy cultivates the land himself, the Zemindar has a right to distrain the crop; but when the land is leased out to under-tenants, the Zemindar loses his right of distraint: for, under Section 68 it is only the crop of the actual cultivator that can be distrained. It would be most unreasonable to hold that a tenant, who by sub-letting deprived his landlord of the right of distraint, could retain his holding as an intermediate tenure, free from all the obligations which attach to intermediate tenures. This opinion is offered with great submisson, because it is, I am aware, opposed to the judgment delivered in *Karoo Lall Thakoor's* case, 7, W. R., 15 (2.) That judgment, however, if it correctly interprets the law, is exceedingly unfair to the Zemindars. Though Section 63 says, that no transfer of a transferable intermediate under-tenure shall be recognized, unless registered in the Zemindar's Sheristah, yet this ruling lays down the principle that an under-tenure, admittedly permanent, intermediate and transferable, need not be rigistered if it was in its inception ryottee (3.)

*4th.*—Is it absolutely necessary that a ryot should hold for 12 years to acquire a right of occupancy?

It is generally assumed that a ryot must have been in possession of his holding for 12 years to acquire a right of occupancy. This, I think, is a very doubtful proposition. There is no magic in the number twelve; and it is submitted that a *khood-kast* ryot, who

(1.) *Vide ante* page 14.
(2.) *Vide* page 13.
(3) This case is further discussed under Section 26.

settles and builds his house upon the land, possesses from the commencement of his tenancy a right of occupancy in it. The law merely says that a ryot who has held land for 12 years shall have a right of occupancy in the land; but it does not say that a ryot who has not held for 12 years shall not have a right of occupancy.

I have thought it right to submit, though with great diffidence, my opinion upon these points, because they involve questions of great importance, though of considerable intricacy.

Act X, 1859 Sec. 7.

Saving of terms of written contracts.

VII. Nothing in the last preceding Section shall be held to effect the terms of any written contract for the cultivation of land entered into between a land-holder and a ryot, when it contains any express stipulation contrary thereto.

Cases in which a lease bars a right of occupancy discussed.

Under Section 6 a right of occupancy is acquired, whether the land is held under a pottah or not; but this Section adds the restriction that there must be nothing in the lease inconsistent with the acquisition of the right. It is sometimes very difficult to say when a lease bars a right of occupancy, and when it does not; and the decisions upon this point, if not conflicting, are at any rate somewhat nicely drawn. In the case of *Ray Odyte Narain Singh*, the Court (Campbell and Glover, JJ.), entered into a very full discussion of the difficulties of the question. "It is clear enough," they observed, "that under Section 6 cultivation as a ryot for 12 years, *primâ facie*, leads to the presumption of a right of occupancy. But this is qualified by Section 7, which excludes all cases in which the land was held under an express written contract, inconsistent with the accruing of a right of occupancy. We must not construe the law in so unjust a way as to suppose, that the absence of a special provision in so many words, against a contingency not contemplated, and which could not be contemplated by the parties, is to deprive the landlord of his right to re-enter. It is enough if the express terms of the pottah or written contract are such, that in the ordinary sense in which they were used at the time, they were understood to convey the right of re-entry. The true test is,—Are, or are not, the terms of the contract in any way consistent with a possible right of occupancy existing or accruing by time? The difficulty is this, that, while such pottahs are precise as to the term, they are often somewhat vague as regards the rights carried by the pottah. As noticed in a former case decided on 10th February, 1865 (1), it often happens that an estate is periodically settled, and all ryots, including those who have a right of occupancy, accept pottahs and give kabuliats for terms of, say, seven years, by which the rate of rent is fixed for that term, although the right of occupying the land may be quite independent of the pottahs; just as in the temporarily settled districts, a Zemindar may accept a 30-years' settlement of Government, without thereby acknowledging himself to be a mere farmer, or giving to Government any right to turn him out at

(1) *Sheeb Dyal Pauleet*, 2, W. R, (Act X.) 51.

the end of 30 years. On the other hand, where a man, having no right in, or occupation of, the land, takes it for the first time like a mere farmer on a lease for a definite term of years, it is clear that the limitation of the term is an express limit, not only of his rate of rent, but of his right of possession, and gives the landlord a right of re-entry on the expiry of the term. When on the face of the contract it appears that the tenant came into possession under that contract only, or that a right of re-entry was reserved to the landlord, no right of occupancy accrues; on the other hand, where there are no such terms, but merely a pottah for a certain number of years, it will be for the landlord to shew that the tenure was such that the express limit of years may be fairly applied to the possession, and construed to give the right of re-entry." 4, W. R., (Act X.) 1. This decision was commented upon by Loch and Macpherson, JJ., in the case of *Poddo Monee Dassia;* and it was said that the rule laid down in the extract above quoted was somewhat too broadly stated, and was not applicable to all cases; for it might so happen that on the one side there was no allegation of previous possession, nor admission of it on the other, while the terms of the lease might not provide for re-entry. Under such circumstances, the inference would be, that the tenant was bound to go out at the expiry of his term, and if he claimed a right of further occupancy, it would be for him to prove that right. 7, W. R., 283.

In my remarks under the previous Section (1), I stated my reasons for thinking that in the absence of a written stipulation to the contrary, all ryots, with the exception of *Neej-jote* ryots, whether they held for a term or not, necessarily acquired after 12 years a right of occupancy in the land.

Pottahs to which ryots not having rights of occupancy are entitled.

**VIII. Ryots not having rights of occupancy are entitled to pottahs only at such rates as may be agreed on between them and the persons to whom the rent is payable.**

A ryot who has no right of occupancy cannot sue for a pottah.

"The meaning of this Section," observed Peacock, C. J., in the case of *Sheik Moheem*, "is, that if a party wants a pottah and has no right of occupancy, he must come to some agreement with his landlord as to the amount of his rent. In this case the ryot has made no agreement as to the rate of rent, but he wants us to fix the rent, which he has no right to ask the Court to do, and which would be equivalent to ordering that he should get a pottah for one year at the rate contended for. If he has no right of occupancy, and the landlord has demanded too much rent and distrained his goods, he might have brought a suit for excessive demand of rent; or if the landlord had sued him for the full amount mentioned in the notice, he might have resisted that suit, and maintained that the amount demanded was larger than he ought to pay. Not having a right of occupancy, the tenant has no right to remain on the land, unless he can agree with the landlord as to the amount of rent." Marsh. Rep., 342. But if the tenant does remain upon the land, the landlord can only recover

(1). *Vide* page. 16.

from him a fair and equitable rate of rent. "The defendant," observed the Court in a recent case, "has no right of occupancy; but when the plaintiff, instead of giving him notice to quit the land, chooses to retain him as a tenant, and asks the Court to compel the tenant to enter into an engagement to pay rent, the Court is bound to see that it does not enforce the payment of any rates, but such as are just and equitable." *Ram Mohon Ghose*, 11, W. R., 304, L. S. Jackson and Markby, JJ. This decision was in accordance with a Full Bench Ruling, which, after many conflicting decisions, finally settled the law upon the subject. "It was contended," said Peacock, C. J., in delivering the judgment of the Court, "that the landlord may enhance the rent of a ryot not having a right of occupancy to any amount he pleases, and specify any grounds that he pleases for such enhancement; and that he is not bound to prove that any of such grounds exist, and that it is for the ryot to prove that no such grounds exist. It appears to me that a landlord cannot enhance the rent, unless he states the grounds on which he seeks to enhance; and if those grounds are disputed, it will be for the Court to determine whether they exist, and whether they are such as to justify the enhancement. Section 8 has been referred to, but it appears to me to have nothing to do with the question. It merely says that a ryot not having a right of occupancy is not at liberty to compel his landlord to give him a pottah at any rent he pleases." *Bakranath Mundle*, 1, B. L. R., (F. B.) 25.

But the landlord can only demand a fair and equitable rent from such tenant.

And can only enhance the rent after notice.

The following deductions may be drawn from these decisions:—

General conclusions.

1. A Zemindar can eject a ryot not having a right of occupancy, who refuses to pay the rent demanded of him.

2. But if the Zemindar permits the ryot to stay on, he can only recover from him a fair and equitable rent.

3. A ryot not having a right of occupancy cannot sue his landlord for a pottah; but if he is sued by his landlord for an enhanced rate of rent, he can plead that the amount claimed is not fair and equitable; or if his goods have been distrained, he can bring a suit against his landlord for an excessive demand of rent.

If on trial of suit for delivery of pottah, parties do not agree as to the time for which the pottah is granted, Court to fix the time.

IX. If on the trial of a suit for the delivery of a pottah instituted by a ryot having a right of occupancy, the parties do not agree as to the term for which the pottah is to be granted, the Court shall fix such term as under the circumstances of the case may seem just and proper: Provided that the term shall not in any case be longer than ten years, and, in estates not permanently settled, shall not extend beyond the period for which the proprietor of the estate has engaged with Government: Provided, also, that if the defendant be a farmer or other person having only a temporary interest in the land, the term of the pottah

Proviso.

shall not extend beyond the period of the continuance of such interest. For cultivators not having a right of occupancy the term of pottah shall be exclusively in the discretion of the person entitled to the rent of the land.

It will be observed that this Section merely applies to suits by occupancy ryots against their landlords for pottahs. It does not extend to cases in which a land-owner sues a ryot for a kabuliat. The difference between the two cases is this, that a right of occupancy is the right of the ryot. It does not give the landlord a right to compel him to continue his occupation. *James Hill* vs. *Jhorie Ghose*, Suth. (F. B.) Rul., 141.

A ryot who sues for a pottah must stand or fall by his pleadings.

It is obvious that a ryot who is sueing for a pottah is in a very different position, so far as the pleadings are concerned, to a ryot who is being sued by his landlord for rent. We have seen in the cases quoted under Section 6, that when a ryot, in answer to a claim for enhanced rent, failed in proving that he was entitled to hold at a fixed rate, he was, nevertheless, allowed to fall back upon the plea that he had a right of occupancy, and was only liable to pay a fair and equitable rate. But when a ryot comes forward to sue his landlord for a pottah, he must stand or fall by the allegations of his plaint. Thus, when a ryot claimed a pottah at a fixed rent, on the plea that the land had been held from generation to generation, and failed to prove his right to a pottah at those rates, it was held that he was not entitled to have a decree for a pottah at fair and equitable rates under Section 6. *Doorga Mohtoom*, Marsh. Rep., 371, Peacock, C J. The opposite view was held in the case of *Sheodie Mahatoon*, by Loch and Dwarkanath Mitter, JJ, 9, W. R., 81; but that case has been virtually overruled by the Full Bench decision, *Golam Mahomed*, 10, W. R, (F. B.) 18, which will be further alluded to under the following Section.

Equitable rates cannot be decreed to a ryot who claims fixed rates.

No suit can be brought unless relationship of landlord and tenant exists.

Before a ryot can maintain a suit for a pottah, he must show that he is in possession of the land; for the relation of landlord and tenant does not exist until possession has been given. *Bhorut Chunder Sein*, 6, W. R, (Act X.) 56; *Nodhee Doss*, 2, Board's Rep, 93. A somewhat singular case is related in Marshall's Reports. An alluvial formation accreted to a ryot's jote, and the proprietary right in the accretion was claimed by the Government on the one hand, and a neighbouring Zemindar on the other. The ryot held his jote under Government, but wishing, apparently, to make sure of the land, whichever way matters might turn out, he sued the Zemindar for a pottah. The Court, however, held that the suit was not maintainable. Section 2, Act X., 1859, observed Peacock, C. J., enacts that "every ryot shall be entitled to receive a pottah from the person to whom the rent of the land held or cultivated by him is payable. In this case the rent of the jote is payable to Government; and as the accretion was to the jote, the plaintiff has no right to demand a pottah from the Zemindar. He is not a ryot of the Zemindar, nor is rent payable by him to the Zemindar for the accretion." *Campbell* vs. *Kishen Dhun Audhikaree*, Marsh. Rep., 67.

X. Every person who grants a pottah is entitled to receive from the person to whom the pottah is granted, a kabuliat or counterpart engagement in conformity with the terms of the pottah. The tender to any ryot of a pottah, such as the ryot is entitled to receive, shall be held to entitle the person to whom the rent is payable to receive a kabuliat from such ryot.

Act X., 1859, Sec. 9.

Person granting pottah entitled to a counterpart engagement.

In order to maintain a suit for a kabuliat, the plaintiff must shew that the relationship of landlord and tenant subsists between himself and the defendants. A mere trespasser cannot be sued for a kabuliat. *Rameshur Audhikaree*, 10, W. R., 407, Peacock, C. J. Nor will a suit for a kabuliat lie against the holder of an alleged rent-free tenure, until the landlord has established his right to assess the land. *Moharajah Ramnath Sing*, 8, W. R., 188, Macpherson, J. For a suit for a kabuliat is not the correct mode of establishing a title; and when no receipt of rent from the party from whom the kabuliat is required is proved, the question of title must be decided before a suit for a kabuliat can proceed. *Syed Jeshon Hossein*, 3, W. R., (Act X.) 3. Of course, the mere allegation on the part of the defendant, that the relation of landlord and tenant does not exist, would not bar the jurisdiction of the Court. In such a case, the Court is bound to ascertain by judicial investigation, if the position of landlord and tenant is proved to exist or not, and to excercise jurisdiction or not according to the result. *Huree Pershad Malee*, Marsh. Rep., 99, Peacock, C. J.

Landlord cannot sue a trespasser for a kabuliat.

Nor the holder of lakhiraj land.

When a suit is brought for determining the rate of rent, as well as for a kabuliat, the landlord need not previously tender a pottah. Such a suit is maintainable, if notice of enhancement has been given for the purpose of determining the amount, to which the rent may be enhanced. A decree in such a suit will have the effect given to it by Section 81, Act X., 1859, (Section 56 of this Act), which declares that if a person, who is required by a decree to execute a kabuliat, refuse to execute the same, the decree shall be evidence of the amount of rent claimable from him; and that a copy of the decree under the hand and seal of the Collector shall be of the same force as a kabuliat executed by the said person. *Thakooranee Dassee*, 3, W. R., (Act X.) 120, Peacock, C. J. It was further held in the same case by the majority of the Judges, (Peacock, C. J., dissenting), that a suit for a kabuliat at an enhanced rate might be brought without notice of enhancement, but that in such a suit brought without notice, the kabuliat could only take effect from the year following that in which the decree was given. At the same time, whether a notice is given or not, the rent of an occupancy-ryot cannot be enhanced, except upon one of the grounds mentioned in Section 18, whether in a suit for enhancement, or in a suit for a kabuliat, or for the recovery of arrears at enhanced rates. "The form of the procedure," observed the Chief Justice, "adopted by the landlord to obtain a higher rent than that previously paid, cannot alter his right. If it would, landowners would only have to sue for kabuliats at increased rents instead

Suit for kabuliat at an enhanced rent.

of giving notice to enhance, and suing for enhancement, or for the recovery of the arrears of the enhancement." *Id.*, 110.

But a recent Full Bench Ruling has practically decided that a suit for a kabuliat, without notice at an enhanced rent, will not lie. "In this case," remarked Peacock, C. J., "the plaintiff brought his suit for a kabuliat at an enhanced rent, without giving notice of enhancement. The suit was commenced on the 29th August, 1866, and decided on the 3rd April, 1867. Assuming the commencement of the suit to be tantamount to a notice of enhancement, according to the Full Bench Ruling, a decree could not be given for a kabuliat at an enhanced rate to commence before 1868. But upon what evidence could the Judge, in April 1867, hold that, in consequence of the increase of produce, the rent commencing from 1868 ought to be enhanced beyond that which the tenant was then paying? I apprehend that such a suit could not be maintained upon the ground that the Court could not speculate in 1866 as to what would be the value of the land in 1868; nor would they allow a ryot to be harassed in 1866 by a suit for determining what would be a fair rent for 1868, when the tenant had a right under Section 19 (Section 20 of this Act) to give up possession at the end of either 1866 or 1867, and might never become liable to pay rent at all for 1868." *Golam Mohamed*, 10, W. R., (F. B.) 14.

If landlord fails to prove that he is entitled to the rent claimed, the suit to be dismissed.

Another very important point was laid down by this Full Bench decision. It had long been doubtful whether a landlord, who sued a ryot for a kabuliat at a given rate of rent, and failed to prove upon the evidence that the rate demanded was fair and equitable, was entitled to ask the Court to decree a kabuliat at a lower rate. The Court, however, held that the plaintiff must stand or fall by his pleadings, and that his suit must be dismissed if he did not make good his right to the rent asked for in his plaint. "It appears to me," said the learned Chief Justice, "that where the plaintiff seeks to compel a tenant to execute a kabuliat of a particular description, and fails to make out a right to a kabuliat of that description, he is not entitled to hvae a decree ordering the ryot to execute a kabuliat of the description to which he is entitled. This opinion is not founded upon mere technicality, but upon principles of justice. A man ought not to have a decree to compel a ryot to execute a kabuliat, unless, at the time he commences the suit, he is willing to execute a corresponding pottah." *Id.*, 18.

In a suit under this Section, if the plaint does not specify the date from which the kabuliat is to commence, it should be returned by the Court; but if the plaint has been admitted, and the case heard, the Judge should supply the omission in the decree by specifying the time from which the kabuliat is to take effect.

A shareholder cannot sue joint-tenant for a kabuliat.

A landlord is not entitled to ask the tenant for a kabuliat for a portion of the land included in one holding. *Abdool Ali*, 8, Suth. W. R., 467. Upon this principle a share-holder could not sue a joint-tenant for a separate kabuliat for his own share. In one case indeed, (*Nidhy Ram Sircar*, 6, W. R., 52), it was held by Bayley and Shumbonath Pundit, JJ., that the purchaser of an undisputed share could compel the tenant to give him a separate kabuliat for his own share; but it is presumed that the tenant was not a joint-tenant; for as the kabuliat is merely the counterpart of the pottah, a tenant who held his land under a joint lease, could not be compelled to

execute a separate kabuliat to each share-holder. And this view is in entire accordance with several rulings of the Court, to the effect that where a number of co-sharers have given a joint lease, it is not competent for one of the share-holders to bring a separate suit for his share of the rent. *Ramjoy Singh*, 5 W. R., (Act X.) 68. But where the plaintiff, though a joint-proprietor, can prove that the defendants have always recognized him as being the proprietor of a particular share of the property, and have paid to him separately a certain proportion of the rent, then the suit will lie against them, without the other joint-proprietors being made parties. But unless the plaintiff either proves that the defendants have paid rent to him separately, or proves an express agreement on their part to pay to him separately, the suit will not lie in the absence of the other share-holders. *Gunga Narain Dass*, 12, W. R., 30 (1.)

Unless by special agreement the rent has been separately paid.

We have seen (2) that a ryot who has no right of occupancy, cannot sue his landlord for a pottah; and, conversely, a landlord cannot sue a ryot who has no right of occupancy for a kabuliat. *Khoda Buksh*, 9, W. R., 595.

Suit for kabuliat will not lie against a non-occupancy ryot.

It must be remembered that the definition of a lease given in the Registration Act includes a kabuliat; and when a lease must be registered, the kabuliat must be registered too (3.)

Registration of kabuliat.

Kabuliats given in exchange for a lease by a cultivator are exempt from stamp-duty, unless a fine or premium has been paid in consideration of the lease. Act XVIII., 1869, Section 15, Clause 10. Such kabuliats, however, are not exempt from stamp-duty, unless a lease has been granted. *Id.*, Section 3, Clause 12. Kabuliats executed by under-tenants are chargeable, under Schedule II., No. 16, with a stamp-duty of one rupee: "provided that the counterpart shall not be available, unless the Collector, or such other Officer as he may authorize in that behalf, shall certify that the proper stamp-duty on the original instrument has been paid. Such certificate shall be endorsed on the counterpart, on the same being produced together with the original instrument, and on the whole being duly executed and stamped in other respects." Where stamp-duty is chargeable on a kabuliat, the cost of the stamp is, in the absence of express agreement, to be borne by the lessor. Act XVIII., 1869, Section 6.

Stamps upon kabuliats.

Act X., 1859, Sec. 10.

Damages for exactions in excess of rent, or for receipt withheld.

Form of receipt.

XI. Every under-tenant or ryot, from whom any sum is exacted in excess of the rent specified in his pottah, or payable under the provisions of this Act, whether as abwab or under any other pretext; and every under-tenant, ryot, or cultivator, from whom a receipt is withheld for any sum of money paid by him as rent, shall be entitled to recover from the person receiving such rent, damages not exceeding double the amount so

(1.) See also *Surrut Soondree Dabya*, 11, W. R., 25; *Woody Chand Dutt*, *Id.*, 393.

(2.) *Ante* page 18.

(3.) *Ante* page 4.

exacted or paid. Receipts for rent shall specify the year or years on account of which the rent is acknowledged to have been paid; and any refusal to make such specification shall be held to be a withholding of a receipt.

*Illegal cesses.* By Regulation VIII., 1793, Sections 54 and 55, all al wabs or cesses then existing were to be consolidated into one specific sum; and the imposition of any fresh cess under any pretence whatever was made "punishable by a penalty equal to three times the amount imposed." No cess, therefore, whatever may be its nature, can be received over and above the rent, unless the ryot has agreed to pay it. Thus, where a landlord sued for certain cesses called Bukoomat, it was held that the plaintiff could "recover from the ryot nothing but the rent, except on the ground of some express contract to pay it." *Orjoon Sahoo*, 10, W. R., 157 (1.) Similarly, when a landlord, who had leased a mehal, called Bainsoondah, from Government, claimed from all the jotedars a cess for grazing their cattle within the mehal, the Court decided that the cess was not recoverable. If the ryots' cattle, it was said, trespassed upon his land, he had his remedy against them under the Trespass Act; but he could levy no cess which the ryots had not contracted to pay. *Bhogeeruth Shikdar*, 9, W. R., 300. Where a cess is illegal, a contract for the collection and payment of such cess is also illegal, on the ground that "any contract made for or about anything which is prohibited by statute is a void contract." *Kumala Kant Ghose*, 11, W. R., 395.

Contract to collect an illegal cess invalid.

*Illegal exactions.* Where a Zemindar after granting a ticca lease collects the rents direct from the ryots, and the amount so received exceeds the rent due from the ticcadar, the excess amount so collected is an exaction, and is recoverable under this Section. *Ramprosad Bhakut*, 1, Board's Rep., 185. In other words, any sum which is collected by a landlord in excess of the amount due to him under the agreement with his ryot, is an exaction, for the recovery of which a suit will lie under this Section. It is not, however, an exaction when the excess is recovered by legal process. Where, for instance, a tenant supplied the Zemindar with rice, on the agreement that the value of the rice was to be deducted from the rent, and the Zemindar, without making the deduction, sued the tenant under Regulation VIII., 1819, and recovered the full amount of the rent, it was held that this was not an exaction under this Section. "The tenant," observed the Court, "might have contested his liability to pay the amount, and might have demanded a summary investigation as to the amount due, and he might have stayed the sale of the tenure by depositing the amount claimed. Instead of doing so, he paid the amount claimed to the Zemindar. The Zemindar having recovered the amount under a proceeding prescribed by law, the question is, whether that is an undue exaction? He possibly might have demanded more than was due after allowing for the rice supplied, but the plaintiff, instead of demanding an investigation, paid the amount claimed, with knowledge of all the facts. Can this be said to be an illegal exaction of rent within Section 10, Act X., 1859?

(1.) See also *Burmoh Chowdhry*, 12, W. R., 29.

We think that it is not an illegal exaction of rent within the meaning of that Act." *Devendra Nath Rai*, 1, Board's Rep., 136, Peacock, C. J.

Receipts.

The present law regarding receipts is merely a re-enactment of Section 63, Regulation VIII., 1793. Any landlord who withholds a receipt is liable to pay to the tenant double the amount as damages. It will be observed that the law does not say that double the amount is to be awarded as a *penalty*, but that the ryot is entitled to "*damages not exceeding double* the amount so exacted or paid." The Court must therefore fix the damages within the above limit, according to the circumstances of each case. *Ras Monee Dabya*, 1, Board's Rep., 135, Norman and Kemp, JJ. If, however, it is proved that receipts have been withheld, the Court must award some damages. The Judge has no discretion as to the award of damages: his discretion is only limited as to the amount. *Zumeerudnissa Khanun*, 1, W. R., 290. But damages under this Section are only recoverable in respect of money actually paid as rent. Thus, where an under-tenant according to agreement had paid on his landlord's account Rs. 492 into the Dinagepore Collectorate as revenue, and a further sum of Rs. 26 as Income Tax, it was held that he had no action against his landlord under this Section, which "merely contemplated cases of money actually and simply paid as rent." *Sameena Beebee*, 6, W. R., (Act X.) 79.

Damages must be awarded if receipt is withheld.

Stamps on receipts.

Receipts for any sum of money in excess of Rs. 20 require a stamp of one anna; but receipts granted to a cultivator for the rent of land paying revenue to Government are exempt from stamp-duty. Act XVIII., 1869, s. 15, cl. 1.

Appropriation of payments.

The receipts must specify the year or years on account of which the rent is acknowledged to have been paid. If, however, the tenant omits to specify on what account the money is paid, the landlord can appropriate it in any way he pleases. "The general rule of law is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money," (1.) "If neither party make any appropriation, the law appropriates the payment to the earlier debt" (2.) It follows therefore that payment of rent for the current year does not necessarily shew that the rent for the past year has been paid. In the case of *Ahmuty* vs. *Brodie* the plaintiff sued for arrears of rent due in 1266. The defendant proved that he had paid large sums of money in that year, but failed to shew any specific appropriation of the money at the time of payment to the rent of that year. The plaintiff claimed to apply Rs. 13,000 to arrears of 1865. The Collector dismissed the claim on the ground that as the suit was for the arrears of 1266, it was not within the Court's cognizance to enquire whether the defendant owed rent for 1265 or not. But the High Court reversed the decision,

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(1.) Addison on Contracts, p. 985.
(2.) Broome's Legal Maxims, p. 728.

observing that "the defendant was bound to prove not only that he paid money in 1266, but that such payment was in accord and satisfaction of the rents of that year. It is a rule of law, that if a debtor has two distinct debts due to one creditor, and makes a general payment without saying to which debt the money is to be applied, it is in the option of the creditor to appropriate the payment to which account he pleases. If, therefore, there was an arrear in respect of the rents of 1265, the plaintiff had a right to apply such part of the money as was necessary for the purpose, for the satisfaction of the arrears of that year: to the extent of such appropriation the defendant will fail in proof of his plea of payment of the rents of 1266." 2, Board's, Rep., 20. Loch and Norman, JJ. At the same time, the payment of the rent of a particular year affords good *primâ facie* grounds for supposing that the rent of the previous year has been paid. "When," the Court observed in the case of *Soorath Soondaree Dabya*, "a tenant shews payment of rent for 1265 and 1266, it is to be presumed that all previous claims have been satisfied; and unless the plaintiff can shew that at the close of 1264 there was an arrear due to him, he is not entitled to carry to the credit of 1264 any of the payments made in 1266. He has not given any evidence that any arrear of rent was due to him in 1264; and we hold therefore that he has failed to discharge the burden which lay upon him." 1, W. R., 274.

Act X., 1859, Sec. 11.

Landholder not to compel the attendance of tenant for adjustment of rent or for any other purpose.

Payment of rent to be enforced under this Act.

XII. All power at any time heretofore vested in Zemindars and other land-holders of compelling the attendance of their tenants for the adjustment of their rents or for any other purpose is withdrawn; and all such persons are prohibited from adopting any means of compulsion for enforcing payment of the rents due to them, other than by suit or distress or otherwise under the provisions of this Act.

Act X., 1859, Sec. 12.

Damages for extorting payment of rent by duress.

XIII. If payment of rent, whether the same be legally due or not, is extorted from any under-tenant or ryot by illegal confinement or other duress, such under-tenant or ryot shall be entitled to recover such damages, not exceeding in any case the sum of two hundred Rupees, as may be deemed a reasonable compensation for the injury done him by such extortion. An award of compensation under this Section shall not bar or affect any penalty or punishment to which the person practising such extortion may be subject by law.

Act X., 1859, Sec. 13.

Enhancement of rent of ryot holding without, or after expiry, &c., of written engagements.

XIV. No under-tenant or ryot, who holds or cultivates land without a written engagement, or under a written engagement not specifying the period of such engagement, or whose engagement has expired or has become cancelled in consequence of the sale for arrears of rent or revenue of the tenure or estate in which the land held or cultivated by him is situate, and has not been renewed, shall be liable to pay any higher rent for such land than the rent payable for the previous year, unless a written notice shall have been served on such under-tenant or ryot, in districts or parts of districts where the Fuslee year prevails, in or before the month of Jeyt, and in districts or parts of districts where the Bengalee year prevails, in or before the month of Poos, specifying the rent to which he will be subject for the ensuing year, and the ground on which an enhancement of rent is claimed. Such notice shall be served by order of the Collector in whose jurisdiction the lands are situate, on the application (which may be on plain paper), of the person to whom the rent is payable, and shall, if practicable, be served personally upon the under-tenant or ryot. If for any reason the notice cannot be served personally upon the under-tenant or ryot, it shall be affixed at his usual place of residence; or, if he have no such place of residence in the district in which the land is situate, the mode of service of such notice shall be by affixing it at the Mâl Cutcherry of such land or other conspicuous place thereon, or at the Village Chowree or Chowpal, or at some other conspicuous place in the village in which the land is situate.

Notice must specify the grounds of enhancement.

This Section is applicable to all ryots, whether they have a right of occupancy or not. No landlord can enhance the rent of a tenant, whatever may be his position, without notice, and the notice must state the grounds of enhancement. "When Section 13," observed Peacock, C.J., "required that the notice of enhancement should specify the grounds on which the enhancement should be claimed, the Legislature could not have intended to compel the land-owner to do that which they considered to be superfluous; still less could they have intended to compel him to do something worse than superfluous, namely, to specify grounds of enhancement by which he was not to be bound. Section 14* authorizes the tenant to contest his liability to pay the enhanced rent demanded

* Section 15 of this Act.

of him; and it is clear that the meaning of the Legislature was, that the grounds specified for enhancement should be such as to justify the enhancement, and that their existence should be proved in the suit in which the tenant should contest his liability to enhancement." *Bakranath Mundle*, 1, B. L. R., 25, (F. B.), Peacock, C. J. This decision, therefore, clearly lays down:—

*1st.*—That no ryot, whether he possesses a right of occupancy or not, is liable to pay an increased rent, unless he has been served with a notice of enhancement under this Section.

*2nd.*—That the grounds of enhancement must be stated, and if these grounds are disputed by the ryot, the Court will have to determine whether they exist, and whether they are such as to justify the enhancement.

In the case of occupancy-ryots, the grounds must be those stated in Section 18.

So far then, all ryots are upon an equal footing, but there is this difference between an occupancy and a non-occupancy ryot: that in the case of the former, *the grounds of enhancement*, are restricted to the grounds mentioned in Section 18,* whereas other grounds may be stated in the case of a non-occupancy ryot; and if these grounds are disputed, it is for the Court to determine whether they are just and reasonable. It is therefore very necessary that the grounds of enhancement should be carefully stated; and in the case of an occupancy-ryot, that they should agree with one or other of the grounds given in Section 18. Where a notice of enhancement was served on an occupancy-ryot, on the ground that he was holding at a rent lower than *surrounding* rates, the Chief Justice decided that the notice was insufficient, "as it did not shew that the tenant was holding at a rate lower than the prevailing rate payable by the same class of ryots for land of a similar description, and with similar advantages in the places adjacent. The words 'surrounding rates' are not at all tantamount to the ground of enhancement specified in the 1st clause of Section 18." *Bogdonath*, 9, W. R., 292, Peacock, C. J.

Instances in which the grounds of enhancement have been held insufficient.

Indistinct or insufficient notice.

The notice must not only state the grounds of enhancement, but it must be intelligible and distinct. Thus, a notice which stated that "there had been a measurement, and that the productive powers of the lands had increased, and that, therefore, Rs. 39 would be a proper jumma according to the village nirick," was held to be indistinct and bad: as it was impossible to say whether the enhancement was meant to be on account of increased productive powers, or of the rent being less than that paid for similar land in the neighbourhood, or on account of its having been shewn by measurement that the tenant held more land than he was supposed to hold. *Khoondkar Abdur Ruhman*, 8, W. R., 330, Macpherson, J. Similarly, a notice which stated that the productive powers of the land had increased, was held to be defective, because it did not add that the increase had been brought about "*otherwise than by the agency or expense of the ryot himself.*" *Syud Soojat Ally*, 6, W. R., 44. These illustrations are sufficient to shew how necessary it is to state clearly in the notice the grounds of enhancement; and when the ryot has a right of occupancy, the grounds alleged must correspond with one or other of the grounds mentioned in Section 18.

Ryots in Government and resumed estates.

The ryots of a Government khas mehal are in exactly the same position with regard to enhancement as the ryots of ordinary Zemin-

* Peacock's, C. J., judgment in *Thakooranee Dassie's case*, 3, W. R., (Act X.) 110.

dars. Their rents can only be *enhanced* after notice under this Section. *The Nawab Nazim*, 6, W. R., (Act X.) 5. It is perhaps hardly necessary to observe that this decision does not apply to the proceedings of settlement officers under Regulation VII., 1822. When the Revenue Authorities resume and assess invalid lakhiraj land, the act of resumption and settlement creates the legal relation of landlord and tenant; and the ex-lakirajdar is bound to pay rent according to the jummabundee, "as the law distinctly provides that such proceedings of settlement officers shall be valid and binding until set aside by the Civil Court." *Hurro Prosad Chowdry*, 6, W. R., (Act X.) 107. In the same way where a Zemindar has obtained a decree for the resumption and assessment of lakhiraj land, no notice of enhancement is necessary. "The defendant," observed the Court in the case of *Ramjeeban Bose*, "held his tenure, averring it to be rent free; the plaintiff sued to resume and obtained a decree, fixing the assessment at Rs. 238 per annum. We hold that the decree was a sufficient notice to the defendant, that he was liable to pay Rs. 238 per annum, and that if he held from year to year, or held over after the expiry of his lease, he did so at the same rate of rent." Marsh. Rep., 396, Peacock, C. J. Similarly, a declaratory decree fixing the rate of rent operates as a notice to the ryot, taking effect from the year following that in which the decree is passed. *Romanath Dutt*, 11, W. R., 3.

Service of notice.

The notice, it will be observed, must be in writing, and must state not only the grounds of enhancement, but the amount of rent demanded; and it must be served in the manner prescribed by the law. The service of a notice upon the *Gomashtah of a purdah nisheen lady* was held to be no service within the meaning of this Section. "The Act," observed Peacock, C. J., "does not say that the notice shall be served personally upon the under-tenant, the ryot, *or his agent*, but upon the under-tenant, or ryot. The notice in this case was not served personally on the under-tenant or ryot; and if for any reason it was shewn that it could not be served personally upon her, then it ought to have been served by being affixed to her usual place of residence in the district, or if she had no such residence, in the manner prescribed by the Act. That not having been done, I do not think that the notice can render the tenant liable to be enhanced." *Chunder Monee Dassee*, 7, W. R., 2. If service of the notice is not proved, the suit must be dismissed: the plaintiff in such a case is not entitled to a declaratory decree with reference to future years. *Kisto Motee Dabya*, 3, W. R., (Act X.) 140.

Separate notice to be served for each holding.

A ryot is entitled to a separate notice for each separate holding he possesses; not only because some of his holdings may be protected from enhancement, while others are not, but because he may be ready to pay the enhanced rent upon some, while he may prefer to relinquish the others. If the whole of his jummas are lumped together and treated as one holding, he has no means of exercising his discretion. *Bejoy Gobindo Bural*, 8, W. R., 252.

Unless the holdings have been consolidated.

When, however, a number of holdings had been treated as one consolidated holding, and the ryots had paid their rent in one entire sum as a consolidated jumma, it was held that one notice was sufficient. "Had the jumma," observed the Court, "not been treated as a consolidated jumma, we should have been disposed to declare that one notice to enhance the aggregate jumma was insufficient; because in cases where a ryot holds several tenures, or separated jummas, he may, on receipt of notice, use his discretion as to

which to retain and which to relinquish. If his several tenures are lumped together and treated as one tenancy, and he is served with the one notice, he is precluded from using this discretion. Under such circumstances, we think we ought not to infer from the fact that the jumma has, for purposes of convenience, been treated as one in the summary suits and other proceedings, that the original separate tenures have been surrendered, and that a fresh taking at an entire rent must have been made; because to do so would seriously prejudice important rights, which the plaintiff may have acquired under the original holdings. Therefore, though we hold that under the circumstances disclosed in this case one notice was sufficient, we must declare that the ryots are entitled to relinquish or retain all or any one of the separate holdings occupied by them at their option under Section 20; and the Lower Court in deciding the case must ascertain what are the separate holdings, and assess a separate rent on each distinct holding." *Jadub Chunder Holdar*, Marsh. Rep., 498, Norman and Kemp, JJ. But though a separate notice is necessary for each separate holding, it is not necessary that the landlord should serve a separate notice on each person interested in such holding. Thus, when a holding had been sub-divided without the consent of the landlord, it was held that it was quite sufficient if notice was served on the recognised and recorded tenants. *Mothooranath Chatterjee*, 2, W.R., (Act X.) 93.

Notice on whom to be served.

By whom to be served.

The notice is to be served on the application of the person *to whom the rent is payable.* A Zemindar who has leased out his property to a farmer cannot serve a notice of enhancement during the continuance of the lease: the notice must be served by the farmer to whom, for the time being, the rent is payable. *Binodee Lall Ghose*, 3, W. R., (Act X.) 157. It is almost needless to observe that farmers and other lease-holders, unless precluded by the terms of their lease, are entitled to enhance the rents of the ryots holding under them. *Rushton*, Marsh. Rep., 331. It is not, of course, neccessary that the landlord should himself sign, and personally apply for the issue of the notice. The signing and issuing of notices is entirely within the scope of the ordinary duties of a Mofussil *Naib*; and no proof is required that the landlord authorized the agent to sign the notice. *Degumber Mitter*, Marsh. Rep., 354.

Gomashtahs.

Act X., 1859, Sec. 14.

Mode of contesting enhancement of rent.

XV. Any under-tenant or ryot, on whom such notice as aforesaid has been served, may contest his liability to pay the enhanced rent demanded of him, either by complaint of excessive demand of rent as hereinafter provided, or in answer to any suit preferred against him for recovery of arrears of the enhanced rent.

Complaint by ryot of excessive demand of rent.

There are two courses open to a ryot, who, after being served with a notice under the preceding Section, disputes his liability to pay the enhanced rent claimed:—

1*st.*—He can take the initiative, and complain that the rent demanded of him is excessive.

*2nd.*—He can wait until sued by the landlord for the enhanced rent, and then plead in answer to the claim that the amount is higher than the landlord is entitled to demand.

Burden of proof in a suit under this Section lies upon landlord demanding enhanced rent.

When a ryot takes the initiative, and brings a suit to contest his liability to pay the rent demanded in the notice, it has been doubted whether the burden of proof lies upon him or the landlord. There are rulings of the High Court both ways (1.) To understand the subject rightly, this Section must be read with Section 5. Section 5 enacts that in cases of dispute, the rate previously paid by an occupancy-ryot shall be deemed to be fair and equitable, unless the contrary be shewn in a suit by either party under the provisions of this Act; that is to say, if a ryot claims an abatement of rent, he must shew that circumstances have occurred to render the previous rate unfair and inequitable; while on the contrary, if the landlord is dissatisfied with the rent previously received, he must prove that he is entitled to more. The present Section makes no alteration in the substantive law, it merely provides two forms of action by which the right to enhance can be tried. The law presumes that the rent previously paid is fair and equitable, and the landlord, who claims an enhanced rent, must rebut the presumption. When a ryot with a right of occupancy has received a notice of enhancement, he is entitled under this Section to go at once to the Court and say,—"I have been served with a notice of enhancement, but the law presumes that the rent I have always paid is fair and equitable, and I demand a decree declaring my right to hold at that rate;" and unless the landlord can rebut the presumption, the tenant will be entitled to a decree. It would be very inequitable if the law were otherwise. An occupancy-ryot, who has hitherto paid Rs. 100 a year rent, and is called upon to pay Rs. 200 for the coming year, may naturally say, rather than pay the enhanced rent, "I will relinquish the land; but before I give up the holding, I will ascertain by a judicial decision whether I am liable to pay so high a rent or not." The Legislature could never have intended that a tenant, who desired that the rate should be definitely fixed before the commencement of the new year, should, so far as the burden of proof was concerned, be in a worse position than the tenant who postponed all action upon the notice, until a suit for the recovering of arrears at the enhanced rate was brought. I have dwelt at length upon this subject, for it is not unreasonable to suppose that this form of action will become more common now that the notice under the preceding Section has to be served in the month of Pous. When the notice was served in Jeyt, it was almost impossible for the tenant to have the rent judicially fixed before the tenancy for the new year had commenced. It is, however, only occupancy-ryots who can avail themselves of this form of action. A non-occupancy ryot cannot ask the Court to fix the rent for the coming year (2.)

Suit under this Section can only be brought by occupancy-ryots.

A ryot failing to prove that he is not liable to enhancement, cannot ask the Court to fix the rates.

It was held in the case of *Sheikh Golamee*, 2, W. R., (Act X.) 91, by Macpherson and Pundit, JJ., that though a ryot fails in proving that he is not liable to any enhanced rent, he can still ask the Court

(1.) *See Denonath Bose*, 1, W. R., 155, Bayley and E. Jackson, JJ.; *Prithee Ram Chowdhry*, 8, W. R., 8, Kemp and Glover, JJ.

(2.) *Vide* the case of *Sheikh Moheem*, Marsh. Rep., 342, *ante* page 18.

to determine what the proper rate of rent is; but this decision has been virtually overruled. In a recent case, *Gunga Narain Chowdhry*, 11, W. R., 377, Norman and E. Jackson, JJ., held that where a plaintiff in a suit under this Section failed to shew that his rent was not liable to enhancement, the case was simply to be dismissed, and that the Court had no right to make the defendant a plaintiff, and proceed to determine what the enhanced rates ought to be.

Act X., 1859, Sec. 15.

Dependent talookdar, &c., holding land at fixed rent without change since Permanent Settlement, not liable to enhancement of rent.

XVI. No dependent talookdar, or other person possessing a permanent transferable interest in land intermediate between the proprietor of an estate and the ryot, who, in any province to which the provisions of this Act may apply, holds his talook or tenure (otherwise than under a terminable lease) at a fixed rent which has not been changed from the time of the Permanent Settlement, shall be liable to any enhancement of such rent, anything in Section 51, Regulation VIII. of 1793, or in any other law, to the contrary notwithstanding.

Effect of sale law on under-tenures.

Under the old Sale Law, Act I., 1845, Section 26, an intermediate tenure was not protected from enhancement, unless it had been held at a fixed rent for 12 years before the Permanent Settlement. But Section 1 of Act X., 1859, declared that Section 26 of Act I., 1845, was subject to certain modifications; and one of these modifications (1) is contained in the present Section, which exempts from enhancement dependent talooks, and certain other tenures which have been held at a fixed rent from the time of the Permanent Settlement.

Rent of under-tenures to be enhanced under Regulation VIII. of 1793, Section 51.

It is somewhat singular that Act X., 1859, contained no rules for the enhancement of the rent of dependent talooks and other permanent transferable under-tenures. A Zemindar, therefore, who wishes to enhance the rent of a dependent talookdar, must proceed under Section 51, Regulation VIII., 1793, and upon the grounds laid down in that Section, and not upon the grounds laid down in Section 18 of this Act. *Brijo Soondur Mitter*, 8, W. R., 496; *Tarinee Kaunt Lahoorie*, 12, W. R., 112. The grounds of enhancement mentioned in Section 51 (2) of Regulation VIII., 1793, may be summed up under three heads:—

Grounds of enhancement.

1. The special custom of the district.
2. The conditions under which the tenure is held.

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(1.) *Vide* Section 107, which provides that all modifications introduced by Act X., 1859, are to continue in force.

(2.) Regulation VIII. of 1793, Section 51, is as follows:—"The following rule is prescribed, to prevent undue exactions from the dependent talookdars.

No Zemindar, or other actual proprietor of land, shall demand an increase from the talookdars dependent on him, although he should himself be subject to the payment of an increase of jumma to Government; except upon proof that he is entitled so to do, either by the special custom of the district, or by the conditions under which the talookdar holds his tenure: or that the talookdar, by receiving abatements from his jumma, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it."

3. The fact of the talookdar having received abatements from his jumma, and thus subjected himself to the increase demanded, provided that the lands are capable of affording it. I will notice each of these heads separately.

1st.—The special custom of the district.

1st. Special custom of the district.

By the special custom of the district, I understand the "customary rate of the pergunnah;" or in other words "the rent paid by similar tenures in the same pergunnah." In *Dyaram's* case, which was decided in 1806, 1, Macnaughten's Rep., 139, the plaintiff held some lands on a *mouroosee ijarah*, or hereditary farm, and it was considered by the Court that "he was entitled to occupy the lands at the usual rate of rent for similar tenures in the pergunnah, and that the Zemindars were not justified in turning him out." Sir William Macnaughten in a note made the following remarks upon the customary rate of the pergunnah:—"The pottah or lease for a *mouroosee ijarah* does not specifically convey more than a hereditary right of occupancy. If it be not *istumrarce*, or entitling the tenant to hold at a fixed rent, the amount of the rent payable to the Zemindar is variable, and when not settled by mutual agreement, is determinable only by the indefinite standard of the 'customary rate of the pergunnah,' that is, 'the rent paid by similar tenures in the same pergunnah.'" The soundness of this opinion was recognised by the Privy Council in *Dhunpat Sing's* case, where their Lordships, after referring to *Dyaram's* case, observed, that "where the suit is against an intermediate tenant, the enhancement ought to be made according to the pergunnah rate of the rents payable, not by the ryots, but by the holders of similar tenures. To assess such an intermediate tenant according to the rents paid by ryots, would necessarily deprive him of all beneficial interest in his tenure." 9, W. R., Privy Council Cases, 3. There are several recent decisions in the High Court to the same effect, but it will be sufficient to refer to the following:—*Moheem Chunder Dey*, 7, W. R., 285; *Huro Soondooree Chowdrain, Id.*, 459; *Monee Kurnika Chowdry*, 10, W. R., 245. The case of *Beemchanand*, which was decided in the same year as *Dyaram's* case, and by the same Judges, lays down the rule which should be followed when it is impossible to ascertain what the pergunnah talookdaree rates are. In that case it was admitted that the lands were held by the talookdar at a variable rent; but as there did not appear to be in the pergunnah any settled rates of rent for similar tenures, according to which the proper rent could be adjusted, it was determined that the rent demandable from the talookdar should be settled by an actual survey, and measurement to be made at the expense of the Zemindar, unless the parties should come to an adjustment between themselves. In the event of no adjustment being made by them, it was decided that the Zillah Judge should cause a measurement of the lands, and estimate of their produce to be taken; and, after deducting from the produce ten per cent. as the customary profit of the talookdar, together with the actual charges of collection, should fix the residue as the annual rent demandable from the talookdar. 1, Macnaughten's Rep., 145.

Rule to be followed when no customary rate exists.

The principle laid down in this decision was afterwards adopted by the Legislature in Regulation V., 1812, Section 8, which was as follows:—"In the case of a dependent talookdar, if the rent of the lands be computed according to the rates payable by ryots or cultivators for land of

a similar quality and description, a deduction shall be allowed from the gross rent in the adjustment of the jumma of such dependent talook at the rate of ten per cent. for the talookdar's profit or income, over and above a reasonable allowance for charges of collection according to the extent of the talook." Though this Section was repealed by Act X., 1859, its principle has always been recognised in the assessment of such tenures. *Mohamed Aynuddeen*, 2, Board's Rep., 749, Morgan and Shumbonath Pundit, JJ.

In another case decided in 1813, the assessment was made upon a slightly different principle. The Court, following local custom, held that the talookdar was entitled to hold free of assessment 4 *kanees* in every *drone* as *jeebka* (1), and 3 *kanees* 4 *gundahs* per *drone* as *mattan*. As there are 16 *kanees* in a *drone*, the deduction in favour of the talookdar in this case would amount to nearly half the land included in the talook. *Ram Kant Dutt*, 2, Macnaughten's Rep., 55.

Accretions to under-tenures.

Where land accretes to an under-tenure, the right of occupancy in the land passes to the owner of the under-tenure, and not to the Zemindar. The general law upon the subject is contained in Clause 1, Section 4, Regulation XI., 1825, which is as follows:—"When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, *whether* such land be held immediately from Government by a Zemindar, or as a subordinate tenure by any description of under-tenant whatever: provided that the increment of land thus obtained shall not entitle the person in possession of the *estate* or *tenure* to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed; and shall not in any case be understood to *exempt* the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation XI., 1819, or of any other Regulation in force. *Nor, if annexed to a subordinate tenure* held under a superior land-holder, shall the under-tenant, whether a *koodkast* ryot holding a *mouroosee istumrarree* tenure at a fixed rate of rent per biggah, or any other description of under-tenant, *liable by his engagements* or *by established usage* to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable."

Belong to under-tenants, but are liable to an assessment for rent.

Under this law, therefore, the right to the occupancy of the accreted land remains with the owner of the present mehal, or subordinate tenure, as the case may be; but so far from saying that it shall be revenue or rent-free, or that the one original revenue or rent assessment shall cover the demand both for the estate, or *original* subordinate under-tenure, as for the accreted portion, the words of the Section shew that the very reverse was in the contemplation of the Legislature, which provides that the one shall pay revenue, the other rent, if payable under law or usage. *Juggut Chunder Dutt*, 6, W. R., (Act X.) 48.

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(1.) Sir William Macnaughten, in a note to this case, describes *jeebka* as "a portion of land granted as an allowance for the maintenance of a family: and *mattan* as a portion of land allotted by a Zemindar as a remuneration for bringing waste lands into cultivation."

Where, however, the tenure to which the land accretes is a permanent under-tenure, held at a fixed rent, the Zemindar cannot assess the accreted land, unless he can show that he is entitled to do so by custom or agreement. *Juggut Chunder Dutt*, 8, W. R., 426. It will be observed that the terms of Clause 1, Section 4, Regulation XI., 1825, refer only to under-tenants intermediate between the Zemindar and the ryot, and to *khoodkast* and other ryots, who may, by the nature of the tenure, and by engagement, possess some permanent interest in the lands; and not to ryots who are mere tenants from year to year. *Zaheeroodeen Paikar*, 4, W.R., 57.

*2nd.* Grounds of enhancement. Conditions under which the tenure is held.

I now proceed to notice the second ground of enhancement recognized by Section 51, Regulation VIII, 1799; the conditions under which the tenure is held. Where a lease exists, the conditions of the tenure will naturally be determined by the words of the lease; but if there is no lease, or the words are uncertain or obscure, we must look at the general circumstances under which the tenure is held. Upon this point, the case of *Dhunpat Sing*, which was decided by the Privy Council in 1867, will well repay perusal. The original pottah, upon the right construction of which that case turned, was granted to one Augham Singh, and was to the following effect:—"In accordance with your application, the lands of Mouzah Cheloone and other villages in the forest of Sukhooa trees, have been assessed with a rental of Rs. 101; everything being consolidated, and a pottah granted to you, it is required that you will in all confidence have the lands of the said forests occupied by Purbuttoa and other ryots, and keep paying to the Sirkar the rent year by year according to this pottah; and whenever you may be summoned for the purpose of hunting, you will attend, accompanied by all the Purbutteas."

In the absence of the words *mokururee* or "generation after generation," a lease is not to be considered hereditary and transferable.

In considering the nature and extent of the interest which this pottah conveyed, their Lordships remarked as follows:—"Their Lordships are not prepared to dissent from the judgment of the High Court, in so far as it found that the pottah taken by itself cannot be held to have granted a *mokururee istumraree* tenure. It does not contain the term *mokururee*, or any equivalent words, from which an obligation on the part of the grantor never to raise the rent is fairly to be inferred; nor does it contain the expressions 'from generation to generation,' or other like words, importing that the tenure, whether the rent was to be fixed or variable, was to be hereditary. Again, neither the date nor the nature of the transaction is, on the whole, in favour of the hypothesis, that the intention of the grantor was to create a perpetual tenure at a fixed rent. The whole policy of the Decennial Settlement, as appears by Regulation VIII., 1793, was adverse to *mokururee* tenures. It made them all subject to re-assessment, unless they fell within the protection of the 49th Section of that Regulation. It is not, therefore, probable that the Zemindar would immediately after the completion of that settlement grant such a tenure, except upon special grounds and adequate consideration: and of these there is no proof. But passing from the pottah taken by itself, it is necessary to consider the character of the occupation of the land, as shewn by the uncontested facts of the case. These facts afford incontestable proof, that ever since the death of Augham Singh, the hereditary character of his sub-tenure has been recognized by the successive Zemindars. There is also evidence that some of

But long uninterrupted usage will supply the omission of the words.

them have recognized its transferable nature. This evidence affords ample grounds for inferring either that the tenure was always intended to be hereditary, though not so expressed in the pottah, or that if the original grant was limited, as was suggested, to the life of Augham Singh, his tenure has by subsequent grant become hereditary and transferable. And upon the proof here given of long uninterrupted enjoyment, accompanied by the recognition of its hereditary and transferable character, it is almost impossible to suppose that a suit by the Zemindar in the Civil Court to disturb the possession of the respondent could not be successfully resisted. The case of *Joba Singh*, 4, S. D. A. Reps., 271, is an authority for the proposition, that evidence of this kind will supply the wants of the words 'from generation to generation' in the pottah." Their Lordships, therefore, held that the tenure was, or had become, hereditary and transferable; and that as the rent had not been changed since the time of the Permanent Settlement, the case came under the protection of this Section. *Dhunpat Sing*, 9, W. R., (P.C.) 3.

In a well-known ghatwalee case, the sunnud contained no words of inheritance, but merely authorized the ghatwal to bring certain villages under cultivation, and to enjoy the produce thereof, season after season, and year after year, in lieu of ghatwalee service; and it was contended that the grant was merely a life grant, and not one of inheritance. But the Court overruled this objection, observing that it was unnecessary to say what would have been the construction of the sunnud in the absence of usage, for it appeared clear, from long uninterrupted usage, that the lands had passed from ancestor to heir, for two or three genrations; that in Mahomedan grants, words of inheritance were not absolutely necessary; and that even if there was no clear authority to shew that a grant in lieu of services, authorizing the grantee to bring the lands into cultivation, and to enjoy the produce thereof, season after season, and year after year, would not create an hereditary right, such a grant, coupled with long usage, where the tenure had passed from ancestor to heir without objection for several generations, would be sufficient to shew that the grant was a grant of inheritance. *Koolodeep Narain Sing*, 6, W. R., 201, F. B. Peacock, C. J.

But in the absence of usage, such a lease would merely create a yearly tenancy.

Where a lease contained the following words,—"You shall continue to pay the sum of Rs. 5 fixed on the whole as ticca jumma of the said mouzah every year, and having cleared the village of jungle, and having brought the lands under cultivation, yourself and through others, as usual, enjoy and occupy the same, with your sons and grand-sons in succession," it was held that this was a lease of which the rent was permanently fixed at Rs. 5, and that it descended from the grantee to his heirs. Being an absolute interest, the grantee and his heirs were entitled to transfer it, and to vest in the transferee the full benefit of the lease. A lease, however, of this nature granted since the time of the Permanent Settlement, would not be binding upon a purchaser at a sale for arrears of revenue. *Watson and Co.*, Marsh. Rep., 330, Peacock, C. J. A lease which does not contain the words "*mokurureee istumraree*," or anything to show that it is intended to be hereditary, but simply the words "*year by year*," creates merely a yearly tenancy, determinable every year at the option of either party. *Punchanun Bose*, 2, W. R., 225.

It very frequently happens that a lease, which conveys a certain number of biggahs within certain defined boundaries, contains in reality a greater quantity of land than is specified; and the question of whether this excess land is liable to assessment furnishes a constant cause of litigation. It seems, however, to be tolerably settled by a number of recent decisions, that where the boundaries are given, the lease covers all the land included within those boundaries, whether in excess of the quantity specified or not. In such cases the lease is not to be construed as a lease of so many biggahs, and no more, but as a lease of certain lands, the number of biggahs being added more by way of description than of limitation (1.)

Leases with defined boundaries.

Include all land within those boundaries.

Where, however, a lease merely conveyed so many biggahs of land without specification of boundaries, the tenant would, under ordinary circumstances, be bound to pay rent for any excess land he might hold. *Bipro Dass Dey*, 2, Board's Rep., 57. But a tenant who had held land, though in excess of his lease, at an unvaried rent from the time of the Permanent Settlement, would be protected from enhancement. A certain ghatwal in Beerbhoom was stated, in certain *ismnavissee* papers prepared by the Police in 1811, to hold a 100 biggahs of ghatwalee land; but upon measurement it was found that the land actually held was very much in excess of 100 biggahs, and the Zemindar sued to assess the excess. But the Court dismissed the case, on the ground that the tenure had been held at a fixed rent from the time of the Permanent Settlement, observing that "if the payment of the quit rent to the Zemindar is considered as creating the relation of landlord and tenant, then the land has been held at a fixed rate of rent, which has not been changed from the time of the Permanent Settlement; and therefore either as a ryot under Section 3, or as a "person possessing a permanent transferable interest intermediate between the proprietor of the estate and the ryot under Section 15, Act X. of 1859, these defendants are entitled to continue to hold at the same rents, and the plaintiff as *putneedar* has no right to any fresh assessment." *Erskine* vs. *Dwarkanath Sing*, 8, W. R., 232, Markby, J. (2.)

But where boundaries are not specified, the ryot must pay for all excess land he holds.

Unless the land has been held at an uniform rent from Permanent Settlement.

Jungle boorie leases are leases for clearing jungle, and are generally granted on what is called a *russudee* jumma. The following may be taken as a very fair specimen of the terms under which these tenures are held:—A lease was granted to A. B. of 4 *drones* 3 *kanees* 4 *gundahs* of jungle poteet land, situated within certain specified boundaries; a deduction of 4 *gundahs* per *kanee*, (in other words, a deduction of ⅕th), was allowed on account of *rukba*, on the condition that the tenant should hold the land rent-free for 1260, and should thereafter pay rent at the following rates:—

Jungle boorie lease.

In the year 1261 at Re. 1 per *kanee*.
" 1262 at " 2 " "

(1) The following cases can be consulted on this point:—*Janoki Bullub Chuckerbutty*, 2, Board's Rep., 365; *Limond, Id.*, 121; *Ram Narain Nundee, Id.*, 19; *Chundra Kanth Mookerjee*, 1, Board's Rep., 174. But see the remarks under Section 18, page 46, where the question is discussed.

(2.) It was held in this case that "*ismnavissee* papers," which were documents roughly prepared by police officers, could not be considered as reliable evidence to show the extent of a ghatwal's holding.

In the year 1263 at Rs. 3 per *kanee*.
" 1264 at the full customary rate (*poora-dustoor*) of Rs. 5 per *kanee*, year by year, and month by month, according to the instalments mentioned. In this case the Court (Bayley and Phear, JJ.) held that the lease conveyed a permanent tenure at a fixed rate of rent; that as the in-coming tenant was embarking upon an adventure, in which all the labor and expense would be his, it was but fair to assume that an interest such as might become beneficial to the lessee was intended to be passed, rather than merely a right of occupation, which might, after 1264, at the option of the landlord, be screwed down by process of law to a simple rack-rent tenure. *Golam Ali*, 9, W. R., 65. But in another case, where the lease was exactly in the same terms, the Court, (Loch and Hobhouse, JJ.) held that the *poora-dustoor*, or full customary rate of 14 annas a biggah, was not a fixed, but a variable rent; that the full customary rates meant the full customary rates for the time being; and that if at any time the full customary rate was more than 14 annas a biggah, the landlord would be entitled to enhance to that amount. *Bharut Chunder Aitch*, 11, W. R., 31 (1.) In the absence of an authoritative ruling, it is submitted that the precedent laid down in *Golam Ali's* case should be followed. Where the parties fix a maximum for the customary rate, it is but reasonable to assume that it was their intention that this maximum rate should under no circumstances be exceeded. No man, as observed by Phear J., would bring waste land into cultivation, if he was liable to be deprived of the fruits of his labour, by having to pay a rack-rent for land which he himself had rendered productive.

Where a maximum customary rate is mentioned, the rent cannot be raised beyond that amount.

Ghatwalee tenures.

Held upon conditions of service.

Ghatwalee tenures are principally found in the western districts of the Lower Provinces. The holders generally pay a small quit rent to the Zemindar, and are besides, bound to render certain services to the State. These services have in many districts become practically obsolete, and much litigation has of late years arisen from the natural desire of the Zemindars to resume and assess these ghatwalee holdings. It is clear, however, from the judgment of the Court in *Koolodeep Sing's* case, that this cannot legally be done. "Some cases," observed Peacock, C. J., in delivering judgment in that case, "were cited to shew that, even assuming these lands to be subject to a ghatwalee tenure, the Zemindar has a right whenever he pleases to dispense with the ghatwalee services, and to take back the lands. Now, I must say that this is the first time I ever heard such a contention as that a landlord can dispense with the services upon which lands are held, and take back the estate. It is not because the services are released or dispensed with, or become unnecessary, that the estate can be resumed. If a grantor release the services, or a portion of the services, upon which lands are holden, the tenant may hold the land free of the services; but the landlord cannot put an end to the tenure, and resume the lands. It might as well be contended that if lands were granted at a small quit rent, the landlord might relinquish or dispense with the payment of the rent and take back the lands." *Kuloodeep Narain Sing*, 6, W. R., 199.

If the service is dispensed with, the ghatwal holds the tenure free of service.

(1.) The same view was afterwards held by the same learned Judges in the case of *Kusseemuddeen Khondkar*, 11, W. R., 164.

The effect of a Government sale for arrears of revenue upon intermediate tenures has now to be considered. Under Act XI., 1859, Section 37, the purchaser of an *entire* estate, sold for the recovery of arrears due on account of the same, acquires the estate free from all encumbrances which may have been imposed upon it *after* the time of settlement, and is entitled to avoid and annul all under-tenures, and to eject all under-tenants with the following exceptions:— Effect of Government sales, upon under-tenures.

1*st.*—*Istumrarce* or *mokurure*e tenures which have been held at a fixed rent from the time of the Permanent Settlement.

2*nd.*—Tenures existing at the time of the Permanent Settlement, which have not been held at a fixed rent; the rent, however, of such tenures is liable to enhancement, though the holders of the tenures cannot be ejected: provided they are willing to pay the enhanced rent. The provisions of Act XI., 1859, of course merely apply to sales which have taken place since that enactment was passed; all previous sales are governed by the laws which were in force when the sale took place.* The earliest Sale Law in the statute book is Regulation XLIV., 1793, Section 5, and up to the present time it stands unrepealed. It provides that when a Zemindaree is sold at a sale for arrears of revenue due from the proprietors to the Government, "all engagements which such proprietors shall have contracted with dependent talookdars, as also all leases to farmers, and pottahs to ryots, shall *stand cancelled from the day of sale;* and the purchaser shall be at liberty to collect from such talookdars and from the ryots whatever the former proprietors would have been entitled to demand according to the established usages and rates of the pergunnah or district in which the properties lie, had the engagement so cancelled never existed."

The general scope and object of these Sale Regulations was very fully discussed by the Privy Council in *Ranee Shornomoyee's* case. "It has been assumed," observed their Lordships, "as the foundation of these Sale Regulations, that the default of the Zemindars may have been occasioned by improvident grants of talooks and other subordinate tenures at inadequate rents; and the purchaser, therefore, has been set free from the obligation of these grants with certain limitations and exceptions." It has been contended, that by the operation of the words "stand cancelled from the day of sale," the existing interest of the talookdar *ipso facto* ceased to exist, without any act done by the purchaser; and that where, from the acquiescence of the purchaser, or those claiming under him, the possession has remained in the talookdar, and those claiming under him undisturbed, and the original rent has been received, no matter for how long, or through whatever number of mesne conveyances, it still remained a bare possession at the will of the Zemindar for the time being, and the rent always liable to enhancement. In this hard and literal construction of the words their Lordships do not concur.....Words which make a bishop's grant "utterly void and of none effect to all intents, constructions and purposes," have been held not to prevent the grant from being good and binding on the grantor, and in some cases confirmable by the successor; and so a proviso in a lease that it *should be void altogether* in case the tenant should neglect to do a certain act, has been held only to make it voidable at the option of the landlord. In the present case, the object of the Government was that the jumma should be duly paid, and that

Under-tenures not *ipso facto* void after a sale, but only voidable at the option of purchaser.

the means of paying it should not be withdrawn by the improvident grants of the Zemindars who had made default; but cases of default might often arise where no improvident grant had been made, where the talookdars and the ryots held at proper rents, and the default was owing to entravagance, mismanagement, or other causes; in such cases Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests.....The conclusion, therefore, at which their Lordships have arrived as to the construction of the Section is this,—that a power was given by it to a purchaser at a Government sale for arrears to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the pergunnah or district, it would have stood had the cancelled engagement so avoided never existed. Suth. Privy Council Cases, 548 (1.) The auction-purchaser is bound to exercise his right of annulling the under-tenures created by the defaulting Zemindar within a reasonable time; and it has been suggested that the right must be exercised within twelve years from the date of the confirmation of the sale. *Tara Chand Dutt*, 7, W. R., 91. In one case the purchaser of a *putnee* talook, sold under Regulation VIII., 1819, who had received rent from an under-tenant for fifteen years after the purchase, was held to have acquiesced in the tenant's possession, and to have waived his right to evict the tenant under Clause 2, Section 11, of that Regulation. *Woomanath Roy Chowdhry*, 5, W. R., (Act X.) 63.

And the right of annulling the under-tenures must be exercised within a reasonable time.

Act X., 1859, Sec. 16.

Rent of talookdar, &c., not changed for twenty years to be *primâ facie* evidence of occupancy at that rent since the Permanent Settlement.

XVII. Whenever, in any suit under this Act, it shall be proved that the rent at which a talook or other tenure is held in the said provinces has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that such talook or tenure has been held at that rent from the time of the Permanent Settlement, unless the contrary be shewn, or it be proved that such rent was fixed at some later period.

In determining whether a tenant is entitled to the benefit of this presumption, the question to be tried is, not whether the rent has been paid at an uniform rent, but whether it has been changed at any time within twenty years prior to the institution of the suit. *Ahmed Ali*, 11, W. R., 432, Mitter, J. The cases cited under Section 4 regarding presumptions are fully applicable to cases falling under this Section.

Grounds on which ryot having right of occupancy is liable to enhanced rent.

XVIII. No ryot having a right of occupancy shall be liable to an enhancement of the rent previously paid by him, except on some one of the following grounds, namely:—

(1.) See also *Modhoo Soodun Koondoo*, 12, W. R., 383, where the Court held that the principles laid down in this decision were equally applicable to sales of *putnee* tenures under Regulation VIII., 1819.

That the rate of rent paid by such ryot is below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent.

Act X., 1859, Sec. 17.

That the rate paid by him is below that prevailing in adjacent places.

That the value of the produce or the productive powers of the land have been increased otherwise than by the agency or at the expense of the ryot.

That the value of the land, &c., has increased independently of the ryot.

That the quantity of land held by the ryot has been proved by measurement to be greater than the quantity for which rent has been previously paid by him.

That the quantity of land held by the ryot is greater than he has paid rent for.

This Section applies only to occupancy-ryots; it does not apply to talookdars or the holders of intermediate tenures (1); nor to land which has been let on lease for the erection of a school or church (2); nor to land situated in the centre of a city and used for building purposes. *Kaleemohun Chatterjea*, 11, W. R., 183, L. S. Jackson, J., and *Id.*, 547. *Bastoo* land upon which a ryot's house is built does not, however, fall within the definition of land used for building purposes, and is, of course, liable to enhancement under this Section. *Nymooddee Joardar*, 12, W. R., 140, Macpherson, J.

This Section applicable only to ryots and to land used for agricultural purposes.

The three grounds of enhancement set forth in this Section are all subject to the limitation contained in Section 5. Under no circumstances can a ryot, with a right of occupancy, be called upon to pay more than a fair and equitable rent. *Noor Mohamed Mundle*, 2, Board's Rep., 93.. And as the existing rent is always presumed to be fair and equitable until the contrary is shewn, it follows that a landlord who claims an increase of rent must clearly make out the grounds upon which the enhancement is sought. The grounds, too, must be one or other of those stated in this Section.

Under no circumstances can an occupancy-ryot's rent be enhanced beyond what isf air and equitable.

The term "prevailing rate" means the rate generally prevalent, or the rate paid by the majority of the ryots in the neighbourhood, *Shadoo Sing*, 9, W. R., 83; and it is for the plaintiff, who seeks to enhance, to shew that the rent paid by the tenant is lower than the prevailing rate. A plaintiff, who alleges as his ground of enhancement that the rates at which the defendant holds are lower than the prevailing rates in the neighbourhood, cannot ask for enhancement on the ground that the pergunnah rates are obsolete; or in other words, that the rates of the whole neighbourhood are too low. *Lakhan Magilla*, 1, Board's Rep., 116. Nor can a landlord, who has failed to shew what the prevailing rate is, ask the Court to give him a decree according to

*Prevailing rate.*

(1.) The following cases can be consulted in this point:—*Badooroonissa Chowdrain*, 10, W. R., 455; *Huree Nath Rai*, 3, W. R., 26; *Nobo Kishore Bose*, 8, W. R., 312. See also *ante* page 32.

(2.) *Ranee Shornomoyee* vs. *Revd. C. Bhumhardt*, 9, W. R., 552.

the rate which the defendant's witnesses admit the land will bear. There is no authority under Act X., 1859, to enhance the rent of a ryot to the rates which the land will bear; and if the plaintiff cannot prove the existence of his grounds of enhancement, the suit must be dismissed. *Jaun Ali*, 9, W. R., 149, Peacock, C. J. In the same way, a Court cannot decree what it may consider to be fair and equitable rates, when the plaintiff merely asks for a decree at the prevailing rates. The Court must find specifically whether the rate claimed by the plaintiff is actually paid by the neighbouring ryots of the same class for similar lands, or what rate is so paid, and decide accordingly. *Pelaram Kotal*, 6, W. R., (Act X.) 45.

**Ryots of the same class.**

It is not, of course, sufficient for the Court to find what is the prevailing rate, it must also ascertain what is the prevailing rate paid by ryots of the same class as the defendant. It has been held that the words "the same class" (1) refer exclusively to occupancy-ryots, but this statement must not be taken too widely, for there may be a separate *class* of ryots within the general body of occupancy-ryots. *Ram Coomar Dhara*, 6, W. R., (Act X.) 33. Thus when a ryot had taken a jungle-clearing lease on a *russudee* jumma, which gradually rose to 10 annas a biggah, and it was found that this was below the rates prevailing in the neighbourhood, the Court held that the finding was bad in law, as it left undetermined the "all important point, whether those rates" were paid by the same class of ryots, and by ryots with similar advantages in the places adjacent. *Pirmanund Sein*, 9, W. R., 349. But ryots are not necessarily of the same class, because they hold under a similar class of landlords. A ryot of a *ganteedar* is not on that account to pay more than the ryot of a Zemindar. *Gouree Nauth Rai*, 12, W. R., 102.

**Places adjacent.**

By the words "places adjacent" the Legislature did not intend that the rates with which the comparison was made should necessarily be those of the village or pergunnah in which the land was situated. It often happens that land lying in a different village or a different pergunnah affords a better guide than land situated within the limits of the same estate. *Dukhin Mohun Rai*, 1, Board's Rep., 167, and 5, W. R., 70.

**Increase in the value of the produce, or productive powers of the land.**

A claim to enhancement based on the increased productive power of the land, or on the increased value of its produce, can only take effect, in cases where the neighbouring rates of rent have not accommodated themselves to the altered state of circumstances, where, in short, all the ryots together are paying less than a fair rate of rent; and to such cases the principle of the Full Bench Ruling in *Thakooranee Dassee's* case would apply. But where there already exists a guide as to what is a fair rate of rent, the precedent is inapplicable. *Greesh Chunder Dass*, 7, W. R., 254. It would seem, therefore, that the procedure, which this Clause provides, should only be resorted to when the old pergunnah rates have become obsolete, and a re-adjustment of the rent is requisite in consequence of a rise in the value

(1) In the North-Western Provinces the expression "the same class" has been held to apply to the caste of the ryot. It seems that in some places high caste ryots pay a lower rent than low caste ryots; a similar custom prevails, I believe, in some parts of Behar.

of the produce. When such re-adjustment is made, it must be made on the principle of proportion; in other words, "the old rent must bear to the increased rent the same proportion as the former value of the produce of the soil, calculated on an average of three or five years next before the date of the alleged rise in value, bears to the present value." *Thakooranee Dassee*, 3, W. R., (Act X.) 43, Trevor, J. "In my opinion," observed Mr. Justice Macpherson in the same case, "the rule of proportion—as the old value of the produce is to the old rent, so is the present value of the produce to the rent which ought now to be paid—is the rule which should be adopted in the absence of any recently adjusted pergunnah customary rates. In thus ascertaining the rate, we shall be ascertaining it on a principle similar to that on which the old pergunnah or customary rates were fixed. We shall be doing what was deemed fair and equitable in the case of ryots having a right of occupancy prior to Act X., and what is not less fair and equitable in the case of ryots having a right of occupancy under that Act. Let the Zemindar, seeking to enhance the rent, go back to any year he chooses, and let him prove that the proportion was then more favorable to him than it has subsequently become. Either party should be at liberty, in each case, to prove any special circumstances tending to shew that the application of the rule of proportion to that particular case would work injustice." *Id.*, 48.

The principle of proportion to be followed in adjusting obsolete rates.

This rule of proportion applies only to cases in which the sole ground of enhancement is an increase in the value of the produce, and to cases in which the rates have not adjusted themselves to altered circumstances. It would not apply to cases where the value of the produce had increased, but where either the productive powers of the land had decreased, or the expenses of cultivation had increased. In such cases the value of the present decreased average produce per biggah, calculated on the produce of three or five years, must be found: and it must be contrasted with the average value of the produce before the decrease in the productive power, calculated in the same way, and the increased present cost of production, as contrasted with the former cost per biggah, must be ascertained also. When these data are ascertained, the formula to be applied will stand thus:—The average value of the produce before the decrease in the productive powers of the land, will be to the average value of the present decreased produce, minus the increased cost of production, as the rent previously paid will be to that which the land ought now to pay. *Showdamonee Dassee*, 7, W. R., 94, Trevor and Glover, JJ. It is hardly necessary to observe that when such intricate calculations have to be made, that enhancement of rent by a suit in Court is an impossibility.

The increase, however, in the value of the produce must be an increase "in its natural and usual value in ordinary years; the accidental and exceptional high prices of a particular year in consequence of drought and scarcity, cannot be treated as a measure by which rent is to be adjusted. A tenant takes land, not with reference to the exceptional high prices of a past year, but with reference to the prices he may reasonably expect to realize for the crops he will raise in succeeding years." *Bhagruth Dass*, 6, W. R., (Act X.) 34. Where a considerable portion of a town had been carried away by

The increase in the value of the produce must be an increase in the natural—and ordinary course.

the Ganges, and the value of the land had consequently increased, it was held that a rise in the value of the land from such a cause was not an increase in *the productive powers* of the land, as contemplated by this Section. *Khoondkar Abdool Ruhman*, 8, W. R., 330.

Increase must have been brought about otherwise than by the agency or expense of the ryot.

But it is not sufficient to shew that the value of the produce or the productive power of the land has increased; the landlord must also shew that this increase has been brought about "otherwise than by the agency or expense of the ryot." When a defendant allows that the productive powers of the land have increased, it is still incumbent on the plaintiff to shew that the agency, which effected the increase, was not that of the ryot. "When," observed the Chief Justice in *Poolin Beharee's* case, "a defendant comes into Court, and the Court asks him, 'what do you say to the plaintiff's claim?' and he says, 'I admit that the productiveness has increased, but not otherwise than by my agency,' such an admission must be taken altogether. So it is in the case of a written statement: A written statement put in by a defendant is not a plea by way of confession and avoidance; it is a statement of the grounds of his defence, and he must verify the statement. If you read a man's answer, you must take the whole admission together. Taking the whole admission together in this case, the defendant says that 'the productiveness has increased, but not otherwise than by my agency,' and the plaintiff then has to prove his case. The general rule of evidence is, that if in order to make out a title, it is necessary to prove a negative, the party who avers the title must prove the title. The plaintiff alleged the right to enhance, on the ground that the productiveness had increased otherwise than by the agency of the ryot. I am of opinion, therefore, that the onus lay on the plaintiff to prove the ground of his right to enhance, namely, 'that the productiveness of the land had increased otherwise than by the agency of the ryot." *Poolin Beharee Sen*, 9, W. R., 190, F. B. Peacock, C. J.

And the onus of proving this lies on the plaintiff.

A ryot who converts arable into orchard land, only liable for arable land rates.

When a ryot had taken a lease of some land covered with jungle at a low rent, and had afterwards cleared the jungle, and made the land into an orchard, it was held that the landlord could not enhance the rent to the rate paid for other orchards in the neighbourhood, inasmuch as the improvements had been effected by the exertion and at the cost of the tenant. It is not, of course, meant that a ryot who takes jungle land is to hold it for ever at jungle rates. When he simply brings jungle land into cultivation, he is liable, after a reasonable time, to pay the full pergunnah rates for cultivated land; but if the land which he originally received was not only uncultivated jungle, but in its then state impracticable for cultivation; if, for instance, it was salt land, which could only be made sweet by special works of the ryot, or rock, which could only be made culturable by special labour, then the ryot who made those works, or expended that labour, would be entitled to hold at exceptionally low rates. So again, if, having received ordinary land, and converted it into land of specially high value, he would only be liable to pay the ordinary rates paid for land of the same quality, irrespective of the special character impressed upon it by himself. *Chowdhry Khan*, 2, W. R., (Act X.) 40.

It was held (1) in one case by Bayley and Shumbonath Pundit, JJ., that the rent of a julkur could be enhanced under this Section. But this seems to be a very questionable ruling, as this Section merely applies to occupancy-ryots; and rights of occupancy can only be acquired in land. A person might acquire by prescription a right to fish in certain waters, but he certainly could not acquire a right of occupancy therein (2.)

Can the rent of a julkur be enhanced under this Section?

Under Clause 3, landlords who have given leases to ryots, without knowing the exact quantity of land which those leases covered, are enabled to measure and assess any excess land that may be found in their ryots' occupation. In a province, like Bengal, where so few estates have been regularly measured and surveyed, a landlord seldom knows the exact quantity of land which a ryot's holding contains. It is, therefore, absolutely necessary that landlords should from time to time measure their estates, and ascertain that their ryots are not occupying more land than they are paying rent for. In England, if a man holds land in excess of his lease he is, *quoad* the excess land, a trespasser, and must be treated as a trespasser, and not as a tenant; and in *Roshum Bebee's* case this doctrine was strictly applied to tenures in this country. The tenant in that case held a certain quantity of land on a jumma of Rs. 5 under a *mokururee* pottah. The plaintiff asserted that the *mokururee* pottah included only 5 *khadas*, whereas the land upon measurement was found to be 8 *khadas:* and he, therefore, claimed rent for the excess 3 *khadas*. But the Chief Justice held that the suit would not lie. "If," observed his Lordship, "the defendant has been paying Rs. 5 rent for the 8 *khadas*, the case does not fall within the 3rd Clause of this Section, for the quantity of land held by him has not been proved by measurement to be greater than the quantity for which rent has been previously paid. If he has been paying the Rs. 5 for the 5 *khadas*, and nothing for the excess, he may be a trespasser as to the excess, but he is not a tenant liable to assessment. *Roshum Bebee*, 6, W. R., (Act X.) 57, Peacock, C. J. But this decision has been considerably modified by later cases; for it is obvious that if it were literally acted upon, the provisions of this Clause, enacting that an excess of area may be a ground of enhancement could never apply or be operative at all, *Sham Jha*, 7, W. R., 122, Bayley and Shumbonath Pundit, JJ.; and not only would this plain provision of the law be rendered of no effect, but a very serious injustice would be done to the whole body of landed proprietors. If the holder of excess land is to be regarded as a trespasser, and not as a tenant, he will acquire, after 12 years' adverse occupation, an absolute title as against his landlord to the land. But a title so acquired is not recognized by the revenue system of the country. The revenue laws are all based on the supposition that for every acre of land revenue is paid; and it would be impossible to exaggerate the confusion that would occur if a stealthy and clandestine occupation for 12 years could confer a secure title to possession. Adverse occupation does not mean a secret occupation, but an open occupation, in which the occupier avowedly professes to hold in his own right, and adversely to his landlord. And here I cannot do

Excess land.

The holder of excess land is not necessarily a trespasser *quoad* such excess.

(1.) *Puran Sautra*, 5, W. R, (Act X.) 20.
(2.) *Vide ante* page 13.

better than quote the remarks of the High Court in the case of *Netta Nunda Ghose*, which have a very close connection with this subject. "We think," observed Steer and Levinge, JJ., "that though by the law of landlord and tenant, as applied in England, a person who takes and cultivates the lands of another, there being no express permission to cultivate on the side of the landlord, nor any express condition to pay rent on the part of the cultivator, would not be allowed to be regarded as a tenant, but treated as a mere trespasser, the peculiar circumstances of this country preclude the applicability of the technical doctrine of the English law of landlord and tenant to such a case. Here it is a very usual thing for a man to squat on a piece of land, or to take into cultivation an unoccupied or waste piece of land. Tenancy in a great many districts in Bengal commences in this way, and where it does so commence, it is presumed that the cultivator cultivates by permission of the landlord, and is under obligation to his landlord to pay him a fair rent, when the latter may choose to demand it. Thus, the established usage of the country regards these parties as landlord and tenant, and unless the landlord thus chooses to treat him, the cultivator is not regarded, as he would be by the law as administered in England, as a trespasser, but as a tenant; and he would be so, although he may never have acknowledged the landlord's right, or entered into any express contract with him for the payment of rent. If he chooses to cultivate the Zemindar's lands, and the Zemindar lets him, there is an implied contract between them, creating a relationship of landlord and tenant." 2, Board's Rep., 102.

The landlord can treat him either as a tenant or a trespasser.

It seems, therefore, now to be pretty well established, that where a ryot is holding land in excess of his lease, and for which he is paying no rent, that the landlord has the option either of ejecting him as a trespasser, or of treating him as a tenant, and assessing the excess land. *David* vs. *Ramdhun Chatterjee*, 6, W. R., (Act X.) 97; *Raj Mohun Mitter*, *Id.*, 106; *Sham Jha*, 7, W. R., 122.

Does a lease for a certain quantity of land with specified boundaries cover all land within those boundaries, even if in excess of the quantity mentioned in the lease?

In speaking of the leases of dependent talookdars, I stated (1) that it appeared to be tolerably settled by a number of recent decisions, that a lease with certain specified boundaries covered all the land included within these boundaries, whether in excess of the area mentioned or not: and the decisions which are there referred to are, of course, applicable to the leases of occupancy-ryots. At the same time it is submitted that these decisions are somewhat unfair to the Zemindars. Where a Zemindar says to a ryot, "I will let you have 50 biggahs of land on payment of an annual rent of Rs. 50," and in the absence of a detailed survey describes the land as accurately as he can, by roughly assigning boundaries to it, the ryot would clearly be entitled to sue for an abatement of his rent, if the area contained within the boundaries fell short of 50 biggahs. And if a ryot could under such circumstances claim an abatement, it seems but fair and equitable, in case the area exceeded 50 biggahs, that the landlord should receive rent for the excess. The boundaries do not fix the area, but simply mark the position of land.

Where, however, a lease is for a specified area without mention of boundaries, there is—no doubt that the landlord can assess any land held by the tenant in excess of that area. *Bipro Dass Dey*, 2, Board's

(1.) *Vide ante* page 37.

Rep, 57. But where land, though in excess of the area mentioned in the lease, has been held at a fixed rent from the time of the Permanent Settlement, it would under Section 4 be exempt from any enhancement. *Janokee Bullab Chuckerbutty*, 2, W. R., (Act X.) 33.

Act X., 1859, Sec. 18.

When ryot may claim abatement of rent.

XIX. Every ryot having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him, if the area of the land has been diminished by diluvion or otherwise, or if the value of the produce or the productive powers of the land have been decreased by any cause beyond the power of the ryot, or if the quantity of land held by the ryot has been proved by measurement to be less than the quantity for which rent has been previously paid by him.

The ryot is not restricted to the grounds of abatement mentioned in this Section.

"Sections 18 and 19," it has been observed, "were passed for the benefit of the ryot, and not for the protection of the Zemindar. Section 18 says, that no ryot having a right of occupancy shall be liable to an enhancement of rent, except upon some one of the grounds therein specified; but Section 19 is differently worded. It exacts that any ryot having a right of occupancy shall be entitled to claim an abatement of rent in any of the three cases mentioned therein, but it does not say that he shall not be entitled to an abatement upon any other grounds. Section 18 was to protect him from enhancement; and Section 19 was intended to give him a right to abatement in certain cases, but not to protect the Zemindar from liability to make abatement in any other case." Thus, where the jumma of a resumed *lakhiraj* estate had been reduced by Government on the condition that the rents of the ryots should be reduced in the same proportion, it was held that the ryots were entitled to the benefit of the stipulation made by Government on their behalf, at the time when the jumma was reduced. It was, however, added that the right of abatement in this case only applied to the case of rents, of which the amounts had been fixed before the jumma was reduced by Government: and not to rents fixed by pottahs or kabuliats subsequently entered into. *Subhawatallah*, 1, *Ind. Jurist*, 7, Peacock, C.J, Bayley and Kemp, JJ.

The grounds of abatement which are expressly recognized by this Section are:—

1*st*.—Diminution of area by diluvion or otherwise.

2*nd*.—A decrease in the value of the produce, or the productive powers of the land arising from causes beyond the ryot's control.

3*rd*.—When the quantity of land held by the ryot has been ascertained to be less than the quantity for which rent has been previously paid.

When area is diminished by diluvion, ryot can either sue for abatement;

With regard to the first ground of abatement, a ryot whose land has diluviated has three courses open to him He may either sue under this Section for abatement of rent; or, he may wait until sued by his landlord, and plead that he is entitled to a certain reduction on account of the diluviated land, *Arsuruddeen*, Marsh. Rep., 558; or, he may complain of an excessive demand of rent, and sue for a refund of the

Or may sue for a refund of the excess taken from him;

sum which has been exacted from him. When a ryot had been compelled to pay an excess rent for 1265 of Rs. 99, for 1266 of Rs. 199, for 1267 of Rs. 195, for 1268 of Rs. 1,126, in all Rs. 1,617; and sued the Zemindar to recover the excess, it was held that the suit was not barred by limitation under Section 30, Act X., 1859 (1.) "No doubt," observed the Court, "when a diluvion took place, the plaintiff had a right of suit to obtain an abatement of his jumma, if the Zemindar had refused to grant such abatement. But he was not bound to sue for that purpose. He was not actually injured until compelled to pay the rent named in the pottah without the allowance of the abatement he claimed. Upon that payment having been extorted from him, he had a new right of action; and, as the suit would appear to have been brought within one year from that date, we think it was in time." *Barry* vs. *Abdool Ali*, 2, Board's Rep., 85, Norman and Kemp, JJ.

Or may set up the fact of a diminution in answer to a claim for arrears of rent.

Where, however, a ryot instead of suing for abatement waits until an action for arrears of rent has been brought against him by his landlord, and then claims a deduction on the ground of diluvion, the whole onus lies upon him of proving the extent of the deduction to which he is entitled, and of shewing precisely what lands have disappeared. The Zemindar, in proving that full rent has always been paid, has proved a sufficient *primâ facie* case, which it is for the tenant to rebut. *Savi* vs. *Obhoy Nath Bose*, 2, W. R., (Act X.) 28.

Other causes which entitle a ryot to an abatement. Land taken up by Government for a road.

An occupancy-ryot is, however, entitled to abatement when the area of his holding has been reduced, not only by diluvion, but by other causes also. Thus, when a portion of a ryot's land had been taken up by Government for a road, it was held that he was entitled to a deduction of rent from the Zemindar for the land taken from him. *Din Doyal Lal*, 6, W. R., (Act X.) 25.

Dispossession through defect of lessor's title.

In another case where a tenant, after obtaining a lease for a certain quantity of land, was evicted from a portion of it, owing to the defective title of his lessor, it was held that he was entitled to an abatement of rent. "When a landlord," observed the Court, "leases any portion of land without any further stipulation with regard to the title, he does thereby impliedly undertake that he has sufficient title to support the lease, and he guarantees the tenant quiet possession and enjoyment. This is the result of the law of England, and we believe that it has always been held to be the same here." *Brojonath Paul Chowdry*, 10, W. R., 120.

Principle upon which the abatement is to be made.

When once it is determined that a tenant is entitled to an abatement of rent, in consequence of the subject of the demise having been diminished, the only thing that requires to be settled is, what was the portion of the original rent which was referable to the portion of the tenure which has disappeared. If there is nothing in the pottah to shew that the rent was apportioned in parcels to the different parts of the whole land, the only way to arrive at a conclusion as to how much of the whole rent is fairly attributable to this particular portion, is to deal with it as a matter of proportion,—that is, such a sum ought to be deducted from the whole rent as would bear to that whole rent the same proportion, as the annual value of the portion of the land that has disappeared bears to the annual value of the land originally leased. *Id.*, 121, Phear, J.

(1.) Section 27 of this Act.

This Section only applies to occupancy-ryots, but all ryots and under-tenants, whether they have a right of occupancy or not, can claim an abatement of rent, if they can shew that they are entitled to it on principles of natural justice and equity. Section 23, Act X., 1859, Clause 3, conferred upon Collectors power to take cognizance of "all claims to abatement," whether preferred by occupancy-ryots, farmers, or under-tenants; and a Full Bench of the High Court has held that a suit for remission of rent, brought by a *putneedar* on the ground that certain portions of land included in his *putnee* had been resumed as *chakeran* by Government, would lie against the Zemindar under Act X., 1859. "It is clear," observed the Court, "that a *putneedar* can be sued by the Zemindar for rent under the 4th Clause (1) of Section 23, and it would be most inconvenient and unreasonable, and indeed would be at variance with the plain meaning of the words 'all claims to abatement of rent' in the 3rd Clause, to hold that he is compelled to go to another Court to claim an abatement of his rent." *Hurokishen Bannerjee*, 1, W. R., 299, (F. B.) In another case a talookdar claimed an abatement of rent on the ground that a portion of his talook had been washed away by a river; and the question arose whether he was entitled to claim a diminution of rent on this account. The Court, however, held that he was so entitled, *unless there was an express stipulation that he should pay, whether the land was washed away or not.* "If a man," observed the Chief Justice, "stipulates to pay rent, it is clear he engages to pay it as a compensation for the use of the land rented; and independently of Section 18 (2), we are of opinion, that, according to the ordinary rules of law, if a talookdar agrees to pay a certain amount of rent, the tenant is exempt from the payment of the whole rent if the whole of the land be washed away, or of a portion of the rent if a portion only be washed away. According to English law, a tenant is entitled to abatement in proportion to the quantity of land washed away, and he is entitled to that abatement in a suit brought by the landlord for arrears of rent." *Assurooddeen*, Marsh. Rep., 558, Peacock, C. J. This question was further discussed by the learned Chief Justice in a subsequent case, in which the tenant claimed an abatement, upon the ground that part of his land had been washed away, and that a part of it had been covered with sand. "We think," observed the Chief Justice, "upon principles of natural justice and equity, that if a landlord lets his land at a certain rent, to be paid during the period of occupation, and the land is, by the act of God, put in such a state that the tenant cannot enjoy, the tenant is entitled to an abatement. The first question then is, whether there was any stipulation in the kabuliat, which precluded the tenant from claiming an abatement, if, by the act of God, any portion of his land was washed away? If it is found that according to an express stipulation in the kabuliat, the tenant is not entitled to any abatement by reason of any part of the land being washed away by the act of God, then the tenant is not entitled to abatement during

Any ryot or under-tenant can sue for abatement, though not under this Section;

If any part of the land leased has been resumed by Government through defect of the lessor's title;

Or if damage has been caused to the land demised by the act of God.

(1.) Clause 4, Section 23, Act X., 1859, was as follows:—"All suits for arrears of rent due on account of land, whether *kherajee* or *lakhiraj*, or on account of any rights of pasturage, forest rights, fisheries, or the like." This Section is omitted from the present Act; but under Section 33, all suits which were cognizable by a Collector under Act X., are now cognizable by the Civil Court under this Act.

(2.) Section 19 of this Act.

the term of that lease. But it is said the lease is at an end; but we think, then, when a tenant holds on after the expiration of the lease, he does so on the terms of the lease, at the same rent, and on the same stipulations as are mentioned in the lease, until the parties come to a fresh settlement. With regard to the land alleged to have been covered with sand, the Judge of the first Court will have to enquire if that portion was covered with sand, and thereby deteriorated or rendered wholly useless; because if the land has been deteriorated or rendered wholly useless, by the act of God, the tenant will be entitled to an abatement, provided there was no stipulation to the contrary in the kabuliat." *Sheik Enayut Ulla*, 2, Board's Rep., 62. At the same time, no ryot can claim abatement unless the depreciation in the value of the land has resulted from causes beyond his control. *Munsoor Ali*, 11, W. R., 291.

Fraud on the part of a lessor has also been held to constitute a valid ground for abatement. Thus, where a Zemindar gave out an estate in *putnee*, but concealed the existence of an intermediate under-tenure, the Court held that the *putneedar* was entitled to an abatement of rent. One would have thought that an action against the Zemindar for damages for the fraudulent concealment would have been a more appropriate form of redress.

Zemindars cannot sue Government for abatement

It is, perhaps, almost needless to observe, that Zemindars are not entitled to claim an abatement of rent from Government on account of diluvion, or any other cause, as the power of altering the public assessment is not vested by the Regulations in the Civil Courts of Judicature, but is reserved exclusively to the Executive Government. *Bhowanee Prosad Chuckerbutty*, 2, Macnaughten's Rep., 242, and Sudder Dewanny Rep. for 1852, page 1094.

Act X, 1859, Sec. 19.

Relinquishment of land by ryot after notice given.

XX. Any ryot, who desires to relinquish the land held or cultivated by him, shall be at liberty to do so, provided he gives notice of his intention, in writing, to the person entitled to the rent of the land or his authorized agent, in districts or parts of districts where the Fuslee year prevails, in or before the month of Jeyt, and in districts or parts of districts where the Bengallee year prevails, in or before the month of Pous, of the year preceding that in which the relinquishment is to have effect. If he fail to give such notice, and the land is not let to any other person, he shall continue liable for the rent of the land. If the person entitled to the rent of the land, or his agent, refuse to receive any such notice, and to sign a receipt for the same, the ryot may make an application on plain paper to the Collector in whose jurisdiction the lands are situate, who shall thereupon cause the notice to be served on such person or his agent in the manner provided in Section 14.

It has been held that this Section does not apply to cases where the ryot has entered into a lease for a specific term. Where, for instance, a ryot had taken a lease for a few years, it was decided that he could not relinquish his holding during the currency of the lease. *Kashee Sing*, 5, W. R., (Act X.) 80, Seton-Karr and Macpherson, JJ. It is submitted, however, that this decision is open to considerable doubt. The wording of the Section is clear; any ryot may relinquish his holding, provided he gives the necessary notice; and it seems doubtful whether we are not putting a forced and restricted interpretation on the law, when we say that the meaning of the words "any ryot" is confined to cases in which there has been no written agreement. Such, at any rate, was the opinion of the learned Chief Justice, who made the following remarks upon this Section in his minute upon Act X.: — "Land-owners should be encouraged to grant leases for terms of years; and Section 19 (1) should be restricted to tenants holding from year to year, or at will. Tenants who have agreed to hold for terms which have not expired, should be excepted from the operation of the Clause. It is useless for a land-owner to grant a lease for a term of years, if the tenant may throw it up whenever he thinks fit." Minute by Sir Barnes Peacock, C. J., 2, Board's Rep., 132.

Do the words "any ryot" include the case of ryots holding under fixed leases?

The notice to the landlord must, of course, be followed by relinquishment of the land. It is the relinquishment of the land, and not the notice, which relieves the ryot from liability. *Nobin Chunder Rai*, 2, Board's Rep., 200. The notice is required by law to be in writing; but a verbal notice of relinquishment is sufficient, provided that the landlord shews by his acts, by leasing out, for instance, the land to another tenant, that he has accepted the relinquishment. *Mahomed Gazee*, 11, W. R., 53. Where a cultivating ryot, without giving notice, went away from the land he had occupied, and neither cultivated nor paid rent for it, it was held that the landlord was justified in assuming that he had relinquished it; and that the tenant had no right to ask to be re-instated in possession, on the ground that he had not formally relinquished it. *Munceruddeen*, 6, W. R., 67. In the same way, where one of two joint tenants abandoned the holding, and left his co-sharer to cultivate the land and pay the rent, it was held that he had relinquished the land, and was not entitled to ask to be re-admitted into possession. *Nuddea Chand Poddar*, 7, W. R., 153.

Notice, unless followed by relinquishment, is invalid. Verbal notices in what cases sufficient. Absconding of ryot tantamount to relinquishment.

This Section does not contemplate the relinquishment of part of a holding. A relinquishment, to be valid must be of the entire holding. *Saroda Soondaree Dabya*, 5, W. R., (Act X.) 78.

The relinquishment of part of a holding not permitted.

In the case of a cultivating ryot the notice of relinquishment can be written on plain paper, Act XVIII., 1869, Section 15, Clause 11; but in other cases a stamp of the following value is necessary under Schedule 1, No. 20:—

| | |
|---|---|
| *(a.)* When the amount of stamp-duty chargeable on the lease does not exceed Rs. 16. | The Stamp-duty with which the lease is chargeable. |
| *(b.)* In any other case ... ... | Rs. 16. |

Act X, 1859, Sec. 20.

What to be deemed an arrear of rent under this Act.

XXI. Any instalment of rent which is not paid on or before the day when the same is payable according to the pottah or

(1.) Section 20 of this Act.

engagement, or if there be no written specification of the time of payment, at or before the time when such instalment is payable according to established usage, shall be held to be an arrear of rent under this Act, and, unless otherwise provided by written agreement, shall be liable to interest at twelve per centum per annum.

Discretionary power vested in Courts to award interest on arrears of rent.

Instalments of rent not paid on the day they fall due are *liable* to interest at 12 per cent. per annum. The law, it will be observed, does not say that the unpaid instalments shall *bear* interest, but that they shall be *liable* to interest. By using the word "liable" the Legislature evidently intended to leave the Court a discretionary power of awarding interest or not—*Kashee Nath Rai Chowdry*, 1, W. R, 154; *See* also *Beckwith* v. *Kisto Jeebun Buxshee*, Marsh. Rep., 278,—and of awarding it from such date as they might think proper. *Moharanee Indrajit Kooer*, 2, Board's Rep., 210. But, under ordinary circumstances, a landlord is entitled to interest unless the tenant can shew that he has either paid, or tendered payment of his rent. As a debtor has to seek out his creditor and pay what is due, so a tenant must not wait till the rent is demanded of him, but must go to his landlord, and pay it on the day that it falls due. *Ranee Shurut Soondaree Dabya*, 5, W. R., (Act X.) 68. If a landlord does not claim interest as it falls due, but accepts sums due on account of principal on successive dates, and for a series of years, without making any demand for interest, and without applying any of the sums paid to the discharge of the interest, the Court will be justified in holding that all claim to interest has been waived. *Dindoyal Pramanik*, Marsh. Rep., 394, Peacock, C. J. But, interest can under no circumstances be awarded where the plaintiff has obtained damages under Section 44; for such damages are given in lieu of interest, and can only be decreed in addition to *rent* and *costs*. *Nobo Kanto Dey*, 1, W. R., 100.

The tenant is bound to tender payment.

Waiver of interest.

Interest not awardable in addition to damages.

Act X., 1859, Sec. 21.

Liability of ryot to be ejected for arrear due.

XXII. When an arrear of rent remains due from any ryot at the end of the Bengalee year, or at the end of the month of Jeyt of the Fuslee or Willayuttee year, as the case may be, such ryot shall be liable to be ejected from the land in respect of which the arrear is due: provided that no ryot having a right of occupancy, or holding under a pottah the term of which has not expired, shall be ejected otherwise than in execution of a decree or order under the provisions of this Act.

A ryot not liable to ejectment for arrears due in the middle of the year.

The receipt of rent of a subsequent year

A ryot cannot be ejected, under this Section, for an instalment of rent which falls due in the middle of the year. The right to eject for non-payment accrues only when an arrear remains due at the end of the Bengalee year, or at the end of the month of Jeyt of the Fuslee or Willayuttee year, as the case may be. *Savi* v. *Chand Sirkar*, Marsh. Rep., 348. And under no circumstances can a landlord, who has received the rent of a subsequent year, eject a ryot on the ground that the rent of a previous year is due. A landlord having

distrained for, and received the rent for 1268, then brought an action to recover the rent due for 1267, and to eject the tenant from the land; but the Court held that the receipt of rent for 1268 barred the landlord's right to eject. "The receipt of rent for 1268," observed the Chief Justice, "had the same effect as if the plaintiff had at the commencement of 1268 created a new tenancy. If he had done so, it is clear that the defendant could not be ejected for non-payment of rent for 1267. So, if the plaintiff had obtained judgment in this suit to oust the defendant for the non-payment of rent for 1267; and had afterwards, instead of executing the judgment, allowed the defendant to continue in possession, and pay rent for 1268, it would have been a bar to his afterwards executing the judgment." *Sheik Peer Bux*, Marsh. Rep., 25, Peacock, C. J. It is perhaps hardly necessary to observe, that occupancy-ryots and tenants whose leases have not expired are protected, under Section 52, from ejectment, if the amount of the arrear with interest, and all costs of suit is paid within fifteen days from the date of the decree.

Bars ejectment for arrears of previous year.

Liability of farmer to have his lease cancelled for arrear adjudged due.

XXIII. When an arrear of rent shall be adjudged to be due from any farmer or other lease-holder not having a permanent or transferable interest in the land, the lease of such lease-holder shall be liable to be cancelled, and the lease-holder to be ejected: provided that no such lease shall be cancelled, nor the lease-holder ejected, otherwise than in execution of a decree or order under the provisions of this Act.

Act X, 1859, Sec. 22.

Proviso.

This Section relates to farmers and other lease-holders who have neither a permanent nor transferable interest in the land. It is sometimes difficult to say whether a tenure is transferable or not. In every district of Bengal there is a different custom. What is the custom in Lower Bengal is not so in the Eastern or Northern parts, and *vice versâ*. In some parts, even *khoodkast* tenants are allowed to sell without reference to their landlords; in other parts the practice has not been allowed, and the only method by which the question in each case can be decided, is by reference to local custom. *Joy Kissen Mookerjee*, 1, W. R., 153. It is not, of course, essential that a tenure should be *mokururee* to make it transferable. There are various descriptions of tenures other than *mokururee* that can be transferred and are transferred every day,—the *Howlahs* and *Neem-Howlahs* of Backergunge and the *Jotes* of Rungpore for example. Neither of these holdings are, properly speaking, *mokururee*, but they are *mouroosee*, and contain hereditary rights, which are, and always have been, considered transferable. *Hurromohun Mookerjee*, 1, W. R., 5. The holders therefore of such tenures cannot be ejected under this Section. When the rent is in arrear the Zemindar must sell the tenure under Section 59; and if the proceeds of the sale do not cover the arrear, he must then proceed against any other property, moveable or

Transferable tenures.

Can only be sold under Section 59; and cannot be cancelled by the landlord.

immoveable, which the debtor may possess. *Nundo Lall Ghose*, 1, Board's Rep., 1.

Unless there is a stipulation in the lease to that effect.

The case, of course, is different where the pottah expressly stipulates that the tenancy shall cease, and the landlord be entitled to re-enter, upon the tenant making default in the payment of his rent. In such cases the landlord can eject the tenant, whether the tenure is a permanent one or not. *Joy Doorga Dabya*, 1, Board's Rep., 133 (1.)

A tenant liable for damages for breach of conditions of the lease, but not to ejectment, unless landlord's right of re-entry has been reserved.

But the lease must expressly stipulate that a breach in its conditions will be followed by ejectment; otherwise the landlord will have no right of re-entry, but must content himself with an action for damages. Thus, where a Zemindar brought an action to eject an Indigo planter for the breach of a stipulation in his lease, whereby the planter undertook to give up such part of the land as should be unfit for Indigo, and not to sub-let the same, it was held that the action would not lie. "We think," observed Peacock, C. J., "that the suit is one which would lie under Act X., 1859, if there had been a breach of a condition by which the ryot was liable to ejectment. Clause 5, Section 25, Act X., 1859, provides for such a case. But in this case, although there was a stipulation, that the defendant should give up such part of the land as was unfit for the cultivation of Indigo, and should not sub-let the same, there was no stipulation that the tenant should be liable to ejectment for a breach of that stipulation. The defendant, therefore, was not liable to ejectment for a breach of that contract; even if it had been proved that a breach had been committed, he would have been liable only to a suit for damages." *Gooroopprosad Sirkar* v. *Philippes*, Marsh. Rep., 366.

Waiver of forfeiture.

I have remarked above (2) that a landlord, who receives rent which has become due since the breach in the conditions of the lease was committed, thereby recognises the tenancy as a continuing one, and cannot be allowed afterwards to take advantage of the condition; and this is true, whether the lease merely gives the lessor power to re-enter on breach of the conditions, or whether it is stipulated that, on breach of the conditions, the lease shall cease and determine, and become utterly void and of no effect. When a lease contains this latter stipulation, "the meaning is, that it shall become void at *the option of the landlord*; for to allow the tenant to determine the tenancy by his own tortuous breach of the conditions, would be to permit him to take advantage of his own wrong: and it is now well settled that in all such cases it is at the option of the lessor, not of the lessee, whether the lease shall or shall not determine upon breach of the conditions. Whether, therefore, the condition be worded that the lessor may re-enter, or that the lease shall become void, acceptance of rent *due after breach* by the lessor will have the effect of confirming the tenancy. It must, however, be borne in mind, that rent by the receipt of which the landlord waives the forfeiture, must be rent which *became due after* the breach of the condition by which the for-

Distinction between void and voidable.

(1.) In this case the tenant is not, of course, liable to be ejected under this Section, but under the general law. All cases which were formerly cognizable by Collectors are now cognizable by the Civil Courts; and Section 23, Clause 5, of Act X., 1859, gave power to Collectors to try all "suits to eject any ryot or to cancel any lease on account of the non-payment of rent, or on account of a breach of the conditions of any contract."

(2.) See page 52.

feiture was occasioned; for it is plain to common sense, that if it became due before the forfeiture, the landlord ought not to lose his right of putting an end to the tenancy by receiving a debt which became due at a time when nothing had happened to render the tenancy voidable" (1.)

Equitable relief in cases of forfeiture.

I shall have occasion to speak hereafter of the equitable relief given to tenants by Section 52, which provides, that ejectment for non-payment of rent shall not be permitted if the total amount due is paid within 15 days after the passing of the decree. That Section, however, only applies to cases in which a lease becomes liable to be cancelled for non-payment of rent: it does not apply to cases in which landlords are entitled to re-enter for the breach of other conditions. In such cases it has been held that the Court must decide according to the contract between the parties, and must adjudge ejectment if the penalties of forfeiture have been incurred. *Ram Coomar Bhuttacharjea*, 7, W. R., 132. The meaning of this decision is, that Courts of Justice, in deciding between landlords and tenants, must act upon the same principles, and be guided by the same rules, that they follow in the interpretation of other contracts; and one of these rules is, that a plaintiff in an action on contract is entitled only to such damages as will compensate him for the loss he has sustained. When, for instance, a certain sum is entered into an agreement by way of penalty, the Court will not necessarily award the full amount entered in the contract; but will assess the damages upon equitable principles, requiring evidence to be given to determine their proper amount (2.) In the same way, the Courts will not adjudge the penalty of forfeiture, if substantial justice can otherwise be done. "Cases of forfeiture," observed Mr. Justice Trevor, "are not favoured when no injury has resulted; and in cases in which the injury can be estimated and compensated in money, our Courts have followed the doctrine of English Courts of Equity,—a doctrine which, in the matter of forfeiture for the non-payment of rent, has been recognized by the local Legislature, and have given relief; when looking to the original intent of the parties in the case, it could give all that a party could in reason desire or expect. In the case before the Court, the intent of the lessor in demanding, and the lessee in giving, security, was simply to secure the punctual payment of the rent secured. This can be obtained by a decree short of an absolute one for forfeiture, namely, by a decree for forfeiture, unless, within 15 days from the date of this decree, security equal to that withdrawn be replaced. By a decree of this nature the plaintiff will obtain all that he can in reason expect; and the relief, which has been sanctioned by the Legislature in analogous cases, will be extended to a class of cases falling within the same principle and requiring therefore the same mode of treatment." *Alum Chunder Shah*, 2, Board's Rep., 52.

Courts will not adjudge forfeiture, if substantial relief can otherwise be granted.

A tenant holding over is bound by the conditions of forfeiture contained in the lease.

Where a lease for a definite term contains a stipulation that the lease shall be forfeited on the breach of certain conditions, and the tenant holds over after the lease has expired, he is still bound by the conditions of his lease, and will be liable to ejectment if those con-

(1.) Smith's Landlord and Tenant, pp. 108-114.
(2.) Broome's Commentaries, page 610.

ditions are broken. *Hari Prosonno Rai*, 1, Board's Rep., 21. But, of course, a landlord may shew by his actions that he has waived the conditions of the lease, and in such cases the right of forfeiture cannot be revived. The holder of a *putnee* tenure granted a *dur-putnee* of the same, and took a kabuliat from the tenant, in which it was stipulated that the landlord should have the right of re-entry, in case any arrears of rent remained unpaid within a month after the close of the year. The *dur-putneedar* defaulted, and the *putneedar*, instead of sueing for possession on account of the breach of the condition, sued the *dur-putneedar* for arrears and in execution of his decree put up the tenure for sale. It was sold and purchased for Rs. 8,000. The purchaser was not called upon to execute any engagement; the rent was received from him in the usual way, and he was recognized as the holder of the *dur-putnee*. After a time the purchaser defaulted, and the *putneedar* then sued him for arrears of rent, and claimed to put in force against him the forfeiture clause of the old kabuliat, and to take khas possession of the *dur-putnee*. But the Court held that the right of forfeiture had been waived. "It is clear," observed the Court, "that the plaintiff might have acted upon the kabuliat against the old tenant who gave it; but having then waived his right of re-entry, he cannot in law" (that is, after selling the tenure in the ordinary manner prescribed by the law), "consider that engagement as a subsisting one between himself and the new purchaser." *Dindoyal Pramanic*, Marsh. Rep., 252.

Unless they have been waived by the landlord.

Act X., 1859, Sec. 29.

Suits by or against Surburakars or Tehseeldars of estates held khas.

XXIV. All suits which under the provisions of this Act may be brought by or against Zemindars or other persons in the receipt of the rent of land, may be brought by or against Surburakars or Tehseeldars of estates held under khas management, whether such estates are the property of Government or of individuals.

Act VI., (B. C.) 1862, Sec. 9.

Proprietor's right to survey and measure his estates.

XXV. Every proprietor of an estate or tenure, or other person in receipt of the rents of an estate or tenure has the right of making a general survey and measurement of the lands comprised in such estate or tenure, or any part thereof, unless restrained from doing so by express engagement with the occupants of the lands.

Can a proprietor not in receipt of the rents measure?

It is an open question whether a proprietor not in receipt of the rents of the estate is entitled to measure. It was held in one case, by Norman and Seton-Karr, JJ., that "the expression *in receipt of the rents*," overrides both the prior members of the sentence, and extends not only "to other persons, but also to the proprietor of the estate or tenure." *Wise* v. *Ram Chunder Bysack*, 7, W. R., 415.

The authority, however, of this decision was questioned in a subsequent case: Mitter, J., observing that "a man who is the admitted proprietor of a mehal, is not bound to shew that he is in actual receipt

of the rents at the time when he applies to measure the land. The words 'in receipt of the rents' have no reference to the first part of the Section, *i.e.*, to the words 'proprietors of tenures and estates'; but to the words 'other persons,' *i.e.*, other than those who are admittedly the proprietors of the tenure within which the lands are situated." *Kisto Monee Dabya*, 9, W. R., 331. There can be no question, I think, that this ruling is correct. In the first place, a Zemindar who receives rent from the *putneedar* is as much in receipt of the rents of the estate as the *putneedar* who receives the rent from the ryot; and in the second place, if a proprietor did not possess the right of making a general survey of his property, he would hardly be able to enhance the rents of the under-tenures within his estate (1.) By a proprietor, however. is meant a proprietor in possession. A proprietor who is not in possession of the property is not entitled to measure the land. *Pureejan Khetoon*, 7, W. R ,96. "The words *any proprietor*," observed Peacock, C. J., "or *other person in receipt of the rents*, shew that the proprietor who claims to measure must be a proprietor in possession, and not a proprietor out of possession, although he may be able to prove his title;" and should, therefore, a person's right to measure be disputed by an intervenor, the only question for the Court to try is, which of the two is in possession. *Kalee Dass Nundee*, 6, W. R., (Act X.) 10.

A proprietor not in possession cannot measure.

It is not, however, necessary that the proprietor should prove that he has actually received the rents of the estate; a proprietor who can shew that he is in undoubted possession of the property is entitled to measure, whether he has previously received the rents of the estate or not. *Raj Chunder Rai*, 4, W. R., (Act X.) 16. With these restrictions every proprietor has the indisputable right of measuring his estate, unless restrained from doing so by express engagements with the occupants of the land. *Kebul Kishen Dass*, 5, W. R., (Act X.) 47. And this right to measure exists, whatever may be the nature of the subordinate tenures within the estate, and whether the rents of such tenures are fixed or not. This question was much discussed in the case of *Run Bahadoor Sing*, when Peacock, C. J., observed as follows:— "The plaintiff in this case is a proprietor of an estate, because he pays rent to Government. The defendant is not a proprietor within that definition. He is entitled to hold the land at a fixed rent. That does not prevent the plaintiff from having a right to measure it.....If he has the right given to him by law, he has a right to enforce that right, without being bound to state his reasons for enforcing it. If the defendant holds at a fixed rent, the plaintiff has a right to measure the land; if the rent is liable to be enhanced, the plaintiff has still a right to measure." 8, W. R., 149.

The right to measure not affected by the land having been let out on fixed leases.

It is perhaps hardly necessary to observe that this Section gives a Zemindar no power to measure *lakhiraj* land. The Zemindar's right of measurement merely extends to the rent-paying land comprised within the estate. *Rung Lall Sahoo*, 4, W. R., 293; *Gholam Khejur*, *Id.*, 445. The rights which are possessed under this Section by a proprietor of an estate, can be exercised by any lessee or under-tenant who is in receipt of the rents of the estate. *Watson and Co.*, 2, Board's Rep., 151.

But Zemindar cannot measure *lakhiraj* land.

(1) *Ante* page 33.

Act X., 1859, Sec. 27.

Registry of transfers of talookdars, &c.

XXVI. All dependent talookdars and other persons possessing a permanent transferable interest in land, intermediate between the Zemindar and the cultivator, are required to register, in the Sheristah of the Zemindar or superior tenant, to whom the rents of their talooks or tenures are payable, all transfers of such talooks or tenures, or portions of them, by sale, gift, or otherwise, as well as all successions thereto, and divisions among heirs in cases of inheritance. And every Zemindar or superior tenant is required to admit to registry and otherwise give effect to all such transfers when made in good faith, and all such successions and divisions: Provided that no Zemindar or superior tenant shall be required to admit to registry or give effect to any division or distribution of the rent payable on account of any such tenure, nor shall any such division or distribution of rent be valid and binding without the consent in writing of the Zemindar or superior tenant.

A transferable ryottee tenure, though virtually intermediate, need not be registered.

There are three classes of ryots recognized by the law :—*First.*—The cultivating or occupying ryot, whom the Zemindar can eject under Section 22, if default is made in the payment of the rent. *Secondly.*—Temporary lease-holders, whose leases are liable to be cancelled under Section 23 for the same cause. *Thirdly.*—The holders of permanent and transferable tenures intermediate between the Zemindar and the cultivator, whose tenures can be sold for arrears of rent, but not cancelled. It is this latter class of tenures which have to be registered under this Section. It is necessary, in my opinion, to keep these distinctions in view, because doubts often arise as to whether a tenure is liable to registration or not: and this is a question which involves very important considerations. I cannot better illustrate my meaning than by quoting the following case :—A Zemindar sued a tenant for arrears of rent, and in execution of the decree sold the tenure. A third party then came forward, and sued for the cancelment of the sale, on the ground that he, and not the person against whom the decree had been given, was in lawful possession of the land. The Zemindar took a preliminary objection, under Section 106, Act X., 1859 (1,) that the plaintiff had no ground of action, as the transfer of the under-tenure to him from the former under-tenant had not been registered. The Court, however, overruled the plea, on the ground that the tenure was a *mokururee jote*, or ryottee tenure, and one therefore which it was not necessary to register. It was admitted that the land was not in the plaintiff's own occupation, but had been sub-let to under-tenants ; but the Court held that this did not make the plaintiff an intermediate holder, as sub-letting did not alter the nature of a tenure which was ryottee in its incep-

(1.) Section 63 of this Act.

tion, and they, therefore, cancelled the sale and restored the plaintiff to possession. *Kuroo Lall Thakoor* 7, W. R., 15, Macpherson, J. The result, therefore, of this decision is, that a cultivator, if his holding happens by custom or otherwise to be transferable, can transfer it not only without the consent of his landlord, but without notifying the same to his landlord. If such is the case, there is an omission in the law; for, unless the transfer is registered in his Sheristah, how can the Zemindar tell whom he is to hold responsible for his rent? Of course no registration is necessary where the holding is non-transferable, for in that case not only is the old tenant responsible for the rent until he has given formal notice of relinquishment, but the purchaser or transferee can be treated by the landlord as a mere trespasser (1.) But where a tenure, though ryottee in its inception, has become practically intermediate by the tenant sub-letting the tenure; and where, by custom or by the tacit consent of the Zemindar, this tenure has further become transferable, I cannot but think that the tenant, who takes advantage of the altered nature of the tenure, is bound to notify under this Section the transfer of possession; and that the transfer, to use the words of Section 63, should not be recognized until so registered. Where a tenure has virtually become an intermediate transferable tenure, it ought to partake not only of the advantages, but also of the liabilities attaching to that description of holding (2.)

Inconveniences resulting from this decision.

Registration is as much for the benefit of the tenant as of the landlord, and it is perhaps on this account that no express penalty is attached to non-registration. "The only object," observed Mr. Justice Markby, "of the provision appears to have been that the Zemindar might have information as to who was his tenant. It is true, then, no express provision for omission to register is provided; but I cannot assume that because the Legislature has not expressly provided a penalty, therefore, the severe one of forfeiture is intended." *Nobin Kishen Mookerjee*, 8, W. R., 96.

No express penalty provided for non-registration.

But in reality, the omission to register entails very serious consequences, both on the tenant who transfers, as well as upon the transferee. Until the registration is effected the tenant who transfers continues liable for the rent, and the Zemindar can sue not only "the assignee of the lessee, but may also hold the original lessee responsible under his covenant." *Kearnes* v. *Bhowanee Churn Mitter*, Suth. F. B. Rul., 169. The transferee, on the other hand, has no legal status as against the Zemindar, until the transfer has been registered; and if ejected from his holding, "he cannot sue the Zemindar, or any one who holds a title under the Zemindar, for possession, until he has himself

The consequences of non-registration.

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(1.) See also Norman's, J., judgment in the case of *Hurreehur Mookerjea*, 7, W. R., 114. In this judgment attention was also called to the not uncommon practice of ryots creating intermediate tenures between their landlords and themselves,—a practice which the Court held to be quite illegal, as a tenant is not at liberty to create such a new estate. I mention this case, because when I was in the Backergunge District, it was a matter of every-day occurrence for ryots at variance with their own landlords to transfer their holdings, in what was called "zimba," to a neighbouring Zemindar; thus interposing the neighbouring Zemindar between themselves and their own landlord.

(2.) *Ante* page 10.

been recognised as tenant, or has been registered as such in the Zemindar's Sheristah." *Mohhtakassee Dassia*, 7, W. R., 158, Markby, J.

Recognition by landlord supplies the place of registration.

Where, however, a landlord has recognized a transfer, by receiving rent from the transferee, he cannot, although the transfer has not been registered in his office, go back and sue the old tenant; but must proceed against the transferee, whom he has recognized as his tenant. *Nobo Coomar Ghose*, 2, Board's Rep., 165. In the same way, where a Zemindar has brought a tenure to sale for arrears of rent, he cannot proceed against the old tenant for arrears which have become due since the sale; he must proceed against the purchaser, although the sale may not have been registered in his Sheristah. *Gopeekisto Gosamee*, Marsh. Rep., 212 (1.)

Where a lease has been taken *benamee*, the landlord can sue the real tenant, though his name has not been registered.

Though the person who is registered in the Zemindar's Sheristah is, *primâ facie*, the only person responsible for the rent, yet the Zemindar, if he finds that the person on his registry is only the *benamee*-holder of the tenure, can, if he chooses, proceed against the real lessees in possession. *Judoonath Paul*, 9, W. R., 71. The law upon this subject is very clearly laid down by Peacock, C. J., in the case of *Heeralall Buxshee*, Ind. Jurist, 81. "In determining this case," said the learned Judge, "it was necessary to try whether *Heeralall* was the real proprietor, and whether *Roopchand* was merely his agent. The Judge had power to determine that question, and has found that the lease was *benamee*, and that *Heeralall* was the actual farmer and the person beneficially interested in it. That being so, we are of opinion that *Heeralall*, as the real proprietor, was liable for the arrears of rent. It is a general rule of English law, that where an agent enters into a contract in his own name as principal, without disclosing the fact that he is merely acting as agent, the principal, when discovered, is liable to be sued upon the contract. But the principal is not liable upon the contract of his agent, if the other party to the contract, with full knowledge of the facts, and having the power and means of deciding to whom he will give credit, elects to give credit to the agent in his individual character."

Suit lies to compel registration.

When a Zemindar refuses to register a transfer, the tenant's remedy is by action in the Civil Court, and the decree of the Court will supersede the necessity of registration; but under no circumstances need a landlord register the sub-division of a holding. *Watson and Co.*, 3, W. R., (Act X.) 165. Of course, a holding can be sub-divided with the Zemindar's consent; and it has been held that a farmer, who is confessedly authorized to receive the surrender of a holding, can likewise sanction the sub-division of a holding, and that this sanction, in the absence of fraud and collusion, will be binding upon the Zemindar. *Huree Mohun Mookerjee*, 2, W. R., (Act X.) 25.

Limitation of certain suits.

XXVII. All suits instituted for the recovery of damages on account of the illegal exaction of rent or of any unauthorized cess or impost, or on account of the refusal of receipts for rent paid, or on account of the extortion of rent by confinement or other duress, or on account of the exces-

(1.) See also *Prosonomoyee Dassee*, 10, W. R., 494.

sive demand of rent, and all suits for abatement of rent, and all suits to eject any ryot or to cancel any lease on account of the non-payment of arrears of rent, or of the breach of the conditions of any contract by which a ryot may be liable to be ejected, or a lease may be liable to be cancelled, and all suits to recover the occupancy of any land, farm, or tenure from which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same, and all suits arising out of the exercise of the power of distraint for arrears of rent conferred on Zemindars and others, by this or any other Act or out of any acts done under color of the exercise of the said power, shall be commenced within the period of one year from the date of the accruing of the cause of action, and not afterwards.

Limitation of suits for grant of pottahs, &c.

Act X., 1859, Sec. 31.

XXVIII. Suits for the delivery of pottahs or kabuliats, and for the determination of the rates of rent at which such pottahs or kabuliats are to be delivered, may be instituted at any time during the tenancy.

Limitation of suits for arrears of rent.

Act X., 1859, Sec. 32.

XXIX. Suits for the recovery of arrears of rent shall be instituted within three years, from the last day of the Bengal year, or from the last day of the month of Jeyt of the Fuslee or Willayuttee year, in which the arrear claimed shall have become due: Provided that if the suit be for the recovery of rent at a higher rate than was payable in the previous year, such rent having been enhanced after issue of notice under Section 13 of Act X. of 1859, or under Section 14 of this Act; and the enhancement not having been confirmed by any competent Court, the suit shall be instituted within three months from the end of the Bengal year, or of the month of Jeyt of the Fuslee or Willayuttee year, on account of which such enhanced rent is claimed.

Act XIV., 1859, not applicable to suits under this Act.

It has been held by a Full Bench decision, that the provisions of Act XIV., 1859, do not apply to rent cases which are governed by the special law of limitation contained in the Act itself. It is not necessary to quote the judgments in the case; but Mr. Justice Norman's decision will well repay perusal, containing as it does the principles of legal construction which are to be followed in interpreting Acts of the Legislature. *Poulson* v. *Modhoosoodun Paul*, 2 W. R., (Act X.) 21,

No deduction of time allowed for minority, &c.

(F. B) It follows, therefore, from this decision, that no deduction of time will be allowed, even to a person who has *bonâ fide* prosecuted his suit in a wrong Court. *Modhoosoodun Moozumdar*, 5, W. R., (Act X.) 44. Nor can any deduction be allowed on account of the minority or other legal disability of the plaintiff. "It can hardly be supposed," observed Peacock, C. J., "that the Legislature, in passing Act XIV., 1859, would have introduced into it provisions as to disability affecting the limitation clauses of Act X., 1859, which had not been introduced into that Act when it was passed. It could scarcely have been the intention of the Legislature, that if a person was an infant at the time his rent became due to him, he should be allowed three years after the attainment of his majority, for the purpose of sueing his ryots for rent due, inasmuch as such a provision would in some cases give him a right to sue for his rents eighteen or twenty years after they became due." *Dinonath Panday*, 5, W. R., (Act X.) 41. It has been supposed that only three years' rent can be recovered under this Act. This, however, is a mistake; under Section 29, four years' rent can be recovered. A plaintiff, for instance, instituting a suit on the 31st Jeyt, 1275, could recover the rent due for 1272, 1273, 1274 and 1275. *Gosain Umur Narain*, 7, W. R., 301; *Doorga Doss Chatterjee* 6, W. R., (Act X.) 63. As an exception to the general rule, that no deduction can be allowed for any cause in computing the periods of limitation prescribed by this Act, I now proceed to notice a somewhat remarkable case which was recently decided by their Lordships of the Privy Council. *Ranee Shornomoyee* brought to sale, under Regulation VIII. of 1819, a *putnee* for arrears of rent due in 1857. The *putnee* was sold, the arrears were paid out of the purchase-money, and the purchaser was put into possession. A suit was then brought to set aside the sale of this *putnee* talook, on the ground of irregularity. The Lower Court decreed the suit, and cancelled the sale on the 26th December 1860; and this decision was upheld by the High Court in appeal on the 30th June, 1863. The effect of this judgment was that the Ranee had to pay back the purchase-money to the purchaser, and the *putneedar* recovered possession of his talook with mesne profits. The Ranee then brought a suit for the arrears of 1857, which she had realized from the purchase-money, but which on the cancellation of the sale she had been compelled to refund. Her suit was, however, dismissed, on the ground that it was barred by Section 32 (1) of Act X., 1859, as the suit should have been brought within 3 years from the time the arrears first became due. The result of this decision was that the Ranee was deprived of her rent for 1857, and the *putneedar* got back his *putnee*, and at the same time relieved himself from the obligation of paying the rent due for that year. Their Lordships, however, thought that "upon the fair construction of Section 32 (2) the time had really not run; that upon the setting aside of the sale, and the restoration of the parties to possession, they took back the estate, subject to the obligation to pay the rent; and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place; and that the appellant was therefore not barred from her remedy." *Ranee Shornomoyee*, 11, W. R.,

Arrears of rent for four years recoverable under this Act.

Where tenure is sold for arrears of rent and the sale is reversed, the arrears are held to accrue from reversal of sale.

(1) Section 29 of this Act.
(2) Section 29 of this Act.

Privy Council Cases 5. A declaratory decree does not, however, constitute a cause of action; and limitation runs from the date the rent fell due, and not from the date on which the declaratory decree was given. Thus, where a plaintiff in 1857 brought an action for the declaration of his right to enhance, and in 1864 obtained a decree, declaring that he was entitled to a certain enhanced rent, it was held that he could not then sue to recover the arrears at the enhanced rate which had accrued during the pendency of the suit. "The non-payment of the rent at the enhanced rates," observed Peacock, C.J., in delivering the judgment of the Full Bench, "and not the declaration of a Civil Court that the plaintiff had a right to enhance, was the cause of action. The action for that cause might have been brought if the decree had never existed. A suit for arrears of rent at an enhanced rate may be brought after notice without first obtaining a decree in a declaratory suit that the plaintiff has a right to enhance.....Parties are often put to much unnecessary expense and delay by these declaratory suits. There was no necessity in this case to bring a suit for a declaration of the right to enhance; at least, the arrears might have been sued for without such suit or a decree pronounced upon it." *Doyamoyee Chowdrainee*, 6, W. R., (Act X.) 77.

Declaratory decree not a cause of action.

A landlord's right of action against his tenant for rent is one, it must be remembered, of yearly occurrence; and the tenant cannot consequently plead adverse possession against his landlord, simply because he may have omitted to pay his rent. "So long," observed Mr. Justice Markby, "as the relation of landlord and tenant exists, the mere omission by the tenant to pay his rent does not constitute an adverse possession, and the statute of limitation has no application. *Troylucko Tarence Dassya*, 7, W. R., 400. If, however, a tenant openly sets up an adverse title, and holds adversely, limitation runs. *Huronath Rai*, 6, W. R., 218. Suits for rent at enhanced rates, it will be observed, must be brought within three months from the end of the Bengalee year, or of the month of Jeyt of the Fuslee year, on account of which such enhanced rent is claimed. Where a plaintiff served a ryot with a notice of enhancement in 1267, and in the first month of 1271 brought a suit for an enhanced rate of rent for 1268, 1269 and 1270, it was held that he could only recover for 1270, as his claim for enhanced rent for the two previous years was clearly barred. *Mahomed Rohimoodeen*, 6, W. R., (Act X.) 96. It may not perhaps be out of place to mention that suits for Malikhana are governed by the general law of limitation, Act XIV., 1857, Section I, Clause 12, and must be brought within 12 years. *Huronondo Sheo*, 9, W. R., 102.

Omission to pay rent for 12 years does not constitute an adverse possession.

Suits for enhanced rent.

Malikana.

Act X., 1859, Sec. 33.

Limitation of suits against agents for money, papers, or accounts.

XXX. Suits for the recovery of money in the hands of an agent, or for the delivery of accounts or papers by an agent, may be brought at any time during the agency or within one year after the determination of the agency of such agent: Provided that if the person having the right to sue shall, by means of fraud, have

been kept from the knowledge of the receipt of any such money by the agent, or if any fraudulent account shall have been rendered by the agent, the suit may be brought within one year from the time when the fraud shall have been first known to such person: but no such suit shall in any case be brought at any time exceeding three years from the termination of the agency.

Construction to be put on the word agent.

Who are the agents referred to in this Section? The Section itself is a transcript of Section 33, Act X. 1859; but Section 24 of that enactment explained who these agents were. Section 24 was as follows:—"Suits by Zemindars and others in receipt of the rent of land against any agents employed by them in the management of land or collection of rents, or the sureties of such agents, for money received or accounts kept by such agents in the course of such employment, or for papers in their possession, shall be cognizable by the Collectors, and shall be instituted and tried under the provisions of this Act, and shall not be cognizable in any other Court except in the way of appeal as provided in this Act." Section 33 of Act X., 1859, merely prescribed the limitation for suits instituted under Section 24: and there could therefore be no doubt that the agents referred to "were agents employed by land-holders in the management of land or collection of rents;" but this Section, which defined the meaning of the word agent, has been omitted from the present Act. It is therefore difficult to say what construction the Courts may please to put upon the word agent.

Limitation in suits against sureties of agents.

It will also be observed that the omitted Section provided not only for suits against agents, but for suits against the sureties of such agents; and the limitation prescribed by Act X., 1859, Section 30, for suits against such sureties, was one year. *Paree Soondaree Dabya*, 8, W. R., 159. But the present Act contains no period of limitation for such suits; and they must, therefore, it is presumed, in future be governed by Act XIV., 1859. If this supposition is correct there will be this anomaly in the law. Suits against the agent will have to be instituted under Section 30 within one year; while suits against the sureties of such agents following the general law of limitation will be in time if brought within six years.

Assuming, then, that suits under this Section are suits by "Zemindars and others in receipt of the rent of land against agents employed by them in the management of land or collection of rents," it remains to discuss—

1*st.*—Who are agents within the above definition?

2*nd.*—What are the powers, duties, and liabilities of such agents?

3*rd.*—Within what period must suits against such agents be brought?

Who are agents employed in the collection of rents, &c.?

1. Sudder Amlahs who are employed as clerks in the Zemindar's office, are not, it has been ruled, agents within the meaning of this Section. *Lala Ratan*, 1, Board's Rep., 96. And this decision was recognized in the case of *Lala Jibun Lall*, 2, Board's Rep., 138, when the Court observed, a "party remaining at the Sudder Cutcherry of the Zemindar

whose duty it is to receive rents sent in by the Gomashtahs and other local agents, is not an agent employed in the collection of the rents. Such a servant is, in fact, a treasurer or accountant, and must be treated as such. But the appellant in this case (who is styled the Dewan of the plaintiff), does, we think, come under the designation of agent employed in the management of land or collection of rents: for we find that he was employed in the management of the estate by making settlements and giving leases; and in this capacity, we gather from the proceedings that he received rent direct from the lessees. Now we do not think that the words management of land must be confined to the local agents or Gomashtahs; but may be extended to agents employed, as the defendant appears to have been, 'in giving leases.' In another case the plaintiff sued her son-in-law for an account, as her agent and *Surburakar* in the management of her estate. The defendant denied his liability, pleading apparently that he merely acted as a sort of banker to his mother-in-law, with whom he lived. The Court, however, held that he was an agent within the meaning of Section 24, Act X., 1859, as he had the entire management of the property, and gave receipts for rent collected by his tehseeldars." *Sooklall Tewarie*, 2, Board's Rep., 167.

The powers of agents.

2. I now proceed to speak of the powers, duties, and liabilities of agents employed in the management of land and collection of rents.

With regard to an agent's power it is, of course, obvious that so far as the agent's authority extends, the landlord or principal is bound by all acts done in pursuance of that authority. So far there can be no doubt or difficulty whatever. The cases in which doubts and difficulties arise are those in which the agent has gone beyond his authority, and done some act which his instructions did not authorize; and then the question arises, whether the principal shall or shall not be bound by it. As a general rule, an agent, employed in the management of land or the collection of rents, is armed with all the authority of the landlord in the discharge of the ordinary duties of his office. He can sign notices of enhancement under Section 14, *Digumber Mitter*, Marsh. Rep., 354; he can receive notice of relinquishment under Section 20; and he can further sanction the sub-division of a holding. *Huree Mohun Mookerjee*, 2, W. R., (Act X.) 25. There is, however, one well recognized restriction upon his authority: he cannot grant leases unless specially authorized by his landlord to do so. This restriction is imposed not only by the custom of the country, but by law. Regulation VIII., 1793, Section 59, is as follows:—"No farmer, without special permission from the proprietor of the lands, shall grant a pottah extending beyond the period of his own lease; nor shall any agent grant a pottah without authority from the proprietor" (1.) A lease, however, which has been granted by an agent beyond the scope of his authority, is valid, if it is afterwards ratified by the landlord. What amounts to a ratification is very often somewhat difficult to decide. In one case the landlord had received rent from the tenant at the rate specified in the lease, and had also entered the tenant's name in his

Cannot grant leases unless specially authorized.

But a lease granted without authority, if ratified by landlord is valid.

(1.) The following cases upon the same subject can, if necessary, be consulted:—*Goluckmonee Dabya*, 1, W. R., 56; *Ooma Tara Dabya*, 2, W. R., 155; *Unoda Proshad Banerjee*, 7, W. R., 394.

What amounts to a ratification.

Zemindaree Sheristah; and these acts were held to be sufficient evidence of the ratification. *Unoda Proshad Banerjee*, 7, W. R., 394. In another case the evidence to ratification consisted in a receipt granted by the landlord in the year after he obtained his majority, in which the tenant was discribed as a *mouroseedar*. The Court, however, held that this was not sufficient, observing "that some more solemn ratification of a *mouroosee* lease is necessary than a casual reference to the tenant as a *mouroosee*dar in a paper having reference to a third party, or than the receipts in which the tenant was styled by the designation, which he had hitherto borne in a lease not granted to him by the landlord, but to which his formal sanction was necessary." *Kenny* v. *Jadub Chunder Rai*, 1, W. R., 127.

Agent can appoint subordinate officers.

It is another well established maxim of law, that an agent cannot delegate to another the power which has been delegated to him. But though an agent cannot appoint another to perform the subject matter of the agency, yet by the general custom of the country he has full authority to appoint tehseeldars and other subordinate officers, and their acts are binding upon the principal. Thus, a receipt given by a tehseeldar appointed by the Naib, would be as binding on the principal as if the tehseeldar had been appointed by himself.

Liabilities of agents.

3. Liabilities of agents.—In a suit against an agent "for the delivery of accounts," the agent can only discharge himself by shewing that he has paid or accounted for all the property which has come to his hand, and for which he is accountable. Thus, where an agent had received payment of rent in rice, instead of in money, it was held that a decree could be given against him for the value of the rice, for which he had not accounted. *Koylash Chunder Ghose*, 7, W. R., 415. At the same time, the agent in rendering his account is entitled to set off against the sums he has received, whatever he may have *bonâ fide* disbursed on his employer's account. These disbursements must, of course, be authorized disbursements, such as the agent had the express or implied authority of his master to make; such, for instance, as payments made for the repair of his employer's house, for the feed and keep of his employer's elephants, or payments to third parties on his employer's account. But with regard to payments to third parties, an agent must shew that such advances or payments were made by the express authority of his master, or with his knowledge and consent. *Fagan* v. *Chunder Kant Banerjee*, 7, W. R., 452, Norman, J.

Authorized disbursements by agents.

It is perhaps hardly necessary to observe that an agent's civil liability continues, though, by the retention of the sums collected by him, he may have committed an offence punishable under the Penal Code. *Skinner* v. *Rujab Ally Khan*, 2, W. R., (Act X.) 105.

Liability of heir of deceased agent.

I may also observe that the heir of a deceased agent is responsible to the extent of the assets he has received, for any sums which the agent has collected and has not accounted for to his principal. To the same extent also is the heir of the surety of such agent responsible. *Sree Mutty Ranee Moheema*, 2, Board's Rep., 75.

One co-sharer can sue the agent if the co-sharer is

Suits under this Section must be instituted by the principal of the agent; but where two landlords jointly appoint an agent for the collection of the rents of their joint property, either of them can sue for an

account, provided the co-sharer is made a defendant. *Puddo Monee Dassee*, 10, W. R., 495. made a defendant.

3. Limitation suits under this Section must be brought either during the agency or within one year after the determination of the agency. With regard to the determination of the agency, it has been held that where an agent is suspended by the principal, the agency is determined from the date of such suspension, and not from the date on which the agent may be formally dismissed. *Radhika Prosad Chatterjee*, 6, W. R., (Act X.) 27, and 5, W. R., (Act X.) 91. Where, however, the agency is for a fixed period, the absconding of the agent is not such a determination of the agency, as to cause limitation to run from the date on which the agent absconds. *Bissessur Rai Chowdry*, 6, W. R., (Act X.) 29. The meaning of this decision is not, as I understand it, that the Act of absconding does not determine the agency, which, in my opinion, it certainly would do; but that where, under the terms of the contract, the agency was to last to such a date, the principal can elect either to sue at once, or to sue within one year from the time from which, under the terms of the contract, the agency was to terminate. Limitation. Where agent is suspended, or absconds.

Though a suit under this Section is barred after the expiration of a year, yet if an agent delivers an account shewing himself to be indebted, a new cause of action arises upon the admission by the settlement of account. An action for the balance would probably be maintainable, not under this Act, but under the rules regulating ordinary civil suits, subject to the limitation of Act XIV., 1859. *Chowdry Chutterpaul Sing*, Marsh. Rep., 405. Upon settlement of accounts a fresh cause of action accrues.

In cases of fraud the cause of action arises from the date on which the plaintiff, using due diligence, became aware of the fraud. If the plaintiff omits, through mere negligence, to inform himself from accounts in his possession, that is his own *laches*. But if the accounts are falsified, or not rendered, that is a fraud on the agent's part. And even if the accounts are rendered, the plaintiff is entitled to such a time as would, with ordinary diligence, enable him to discover the fraud, and the cause of action would arise from such discovery. *Ramkant Chowdry*, 6, W. R., (Act X.) 20. But the landlord must use due diligence, for, as observed by Markby, J., in another case, "the Legislature never intended by this Section that a man who did not take the trouble to look after his own interests, and carelessly chose to let accounts lie for a long period of time uninvestigated, could at any time after many years suddenly take up the accounts, examine them, and say in answer to any question of limitation, that he had not discovered the fraud until he chose to make the investigation. It is clear that the Legislature only intended to give the benefit of the extended period to a man who shewed reasonable diligence in the investigation of his accounts." *Dhunput Sing Doogar*, 11, W. R., 163; see also *Biddell*, 12, W. R., 116. Fraud. Principal must use due diligence in discovering the fraud.

Suit for further balance to be instituted within six months of service of notice of deposit.

XXXI. Whenever a deposit on account of rent shall have been made under the provisions of this Act, or of Act VI. of 1862, passed by the Lieutenant-Governor of Bengal in Council, no suit shall be brought against the person making the deposit, or his Act VI., (B. C.) 1862, Sec. 6.

representatives, on account of any rent which accrued due prior to the date of the deposit, unless such suit be instituted within six months from the date of the service of the notice in Section 5 of the said Act VI. of 1862, or in Section 47 of this Act mentioned.

Deposit to be made after the rent has become due.

It will be observed that a suit for arrears of rent, which accrued due prior to the deposit, must be brought within six months from the date of the *service* of the notice; that is to say, from the date on which the landlord received intimation that the deposit had been made. It is, therefore, very essential that the tenant should see that the notice is duly served upon the landlord, and should preserve evidence of such service.

Are suits for enhanced rent affected by this Section?

The deposit which is contemplated by this Section is a deposit after the rents have *become due;* a tenant, who deposited rent before it became due, would not be entitled to claim the benefit of the special limitation prescribed by this Section. *Tara Monee Koonwaree*, 6, W. R., (Act X.) 98. It was also laid down in this decision that it was not intended that the present Section should "make any change in the law of limitation for or against landlords as regards suits for *enhanced rents;* that it related to deposits made *after* the expiration of a year of former rents tendered by the tenant, and refused by the landlord on grounds other than that of a previous service of notice for enhancement." This ruling certainly seems open to question, for the law allows the deposit to be made, whenever the landlord refuses to accept the rent tendered, and it matters not, whether that refusal is owing to the landlord claiming an enhanced rent, or to any other cause. It is, therefore, submitted that when a deposit has been regularly and legally made, the landlord must sue within six months from the date of the service of the notice, whether he claims enhanced rent or not. The only hardship to the Zemindar, is that he must sue for the enhanced rent he claims within six months from receiving notice of the deposit: whereas if no deposit had been made, he might have sued within three months from the end of the Bengallee year (1.) In another case *(Sheik Mohummed Shuhurullah*, 7, W. R., 487) a Zemindar had sold a *putnee* for arrears of rent, due in 1224, Mughee. The *putneedar* sued for the reversal of the sale, and deposited the rent for 1225. The sale was reversed, and the Zemindar then sued for the rent of 1224, and was met with the objection that the suit should have been brought within six months from the date of the deposit of the rent of 1225. But the High Court held that this Section did not apply, and that the Zemindar was entitled to recover, as he had brought his suit within the three years allowed by law. It is submitted, however, that this case might have been decided on the principles enunciated by the Privy Council in *Ranee Shornomoyee's* case, (2) namely, that the rent for 1224 did not fall due till the reversal of the sale, which event happened *after* the deposit had been made.

Effect of reversal of sale after deposit.

(1.) *Vide* Section 29.
(2.) *Vide ante* page 62.

Naibs or Gomashtahs to be deemed, in certain cases, authorised agents under Act VIII. of 1859.

XXXII. Every Naib or Gomashtah thereto specially authorised by any writing under the hand of his employer, shall, for the purposes of all suits for any of the causes of action mentioned in Sections 27, 28, 29, or 30 of this Act, be deemed to be the recognised agent of such employer within the meaning of Section 13 of the said Act VIII. of 1859, though such employer may be within the jurisdiction of the Court in which such Naib or Gomashtah may appear or make any application.

Agents require a written authority to conduct cases.

Which must be stamped.

Suit to be brought in the name of the principal.

Under Act VIII., 1859, Section 17, applications and appearances in suits can be made by recognized agents when the principals of such agents do not reside within the jurisdiction of the Court. This Section enables the agent to act in all cases, whether the principal resides within the jurisdiction of the Court or not. The agent cannot, however, act unless he holds a written authority under the hand of his employer; and it has been held by a Full Bench that a sunnud or written document of this sort, authorizing a Gomashtah to collect rents generally, and to sue for them, requires a Rs. 4 stamp under Article 43, Schedule A of Act X., 1862. *Rughu Nundun Thakoor*, 1, B. L. R., (F. B.) 55. Under the present Stamp Law, Act XVIII., 1869, Section 2, No. 32, a general power requires a stamp of Rs. 8. The Gomashtah cannot, however, sue in his own name; he must sue in the *name and on behalf of his employer;* for no man can be plaintiff except the person or persons who have the right to recover. The only effect of this Section is to enable the person who is employed in the collection of rents to do that as agent, which would otherwise have to be done by the plaintiff in person. *Moodhoo Soodun Sing*, 11, W. R., 43, Markby, J. It is perhaps almost needless to observe that a duly appointed Gomashtah can sue, not only for rents which fell due after his incumbency, but for rents which fell due before his appointment. He stands, in fact, in precisely the same position with respect to arrears of rent which accrued during the time of his predecessors, as he does with respect to rents which accrued during his own time. *Id.*, 41.

Cognizance of suits under this Act.

XXXIII. From and after the time when this Act shall commence and take effect in any place, the jurisdiction, save as regards any suits or proceedings then pending, of the Collectorate Courts in such place, under Act X. of 1859 of the Governor-General in Council, and Act VI. of 1862 of the Council of the Lieutenant-Governor of Bengal, to entertain suits, shall cease, and all suits brought for any cause of action arising under either of those Acts or this Act shall, from such time and in such place, be cognizable by the Civil Courts according to their several jurisdictions.

Proceedings to be regulated under Code of Civil Procedure.

XXXIV. Save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the Cdoe of Civil Procedure passed by the Governor-General in Council, being Act No. VIII. of 1859, and by such further and other enactments of the Governor-General in Council in relation to Civil Procedure as now are, or from time to time may be in force; and all the provisions of the said Act and of such other enactments shall apply to such suits.

Jurisdiction in certain suits.

XXXV. The cause of action, in suits brought for the delivery of any pottah or kabuliat, or for the cancelment of any lease for the determination of rates of rent, for illegal exactions of rent, cess, or impost, for refusal of receipts for rent paid, for extortion of rent, for excessive demand of rent, for abatement of rent, for arrears of rent, and for refusing to register transfers, successions, or divisions under Section 26, shall be deemed to have arisen within the jurisdiction of the Court, which would have had jurisdiction to entertain a suit for the recovery of the land, or other immoveable property in relation to which the cause of action arose, and shall be brought in such Court and in no other Court.

Provision when cause of action arises in different jurisdictions.

XXXVI. If the land which, by the provisions of the next preceding Section, determines the place in which the cause of action in the suits in the said Section mentioned shall be deemed to have arisen, be situate within the jurisdiction of different Courts, the provisions of Sections 11 and 12 of the said Act VIII. of 1859 shall apply to such suits, as if the same had been suits for the recovery of such land.

The suits which are enumerated in Section 35, so far as the jurisdiction of the Courts are concerned, will be treated as suits for lands or other immoveable property; but all other descriptions of suits under this Act, must, as provided by Section 5, Act VIII., 1859, be brought in the Court within the jurisdiction of which the cause of action shall have arisen, or within the jurisdiction of which the defendant at the time of the commencement of the suit shall dwell, or personally work for gain. The general question of the jurisdiction of the Civil Courts

is very fully discussed in Mr. Broughton's valuable work on the Civil Procedure Code, Section 5.

Proceedings in case of opposition made to the measurement of land.

Act VI, (B. C.) 1862, Sec. 9.

XXXVII. If any person, intending to measure any land which he has a right to measure, is opposed in making such measurement by the occupant of the land; or if any under-tenant or ryot, having received notice of the intended measurement of land held or cultivated by him, which is liable to such measurement, refuses to attend and point out such land, the person claiming the right to measure such land may apply to establish his right to measure such land, in the Court which would have jurisdiction in case such suit had been brought for the recovery of such land, and such Court shall hear and determine the right to make such measurement, and, if the case shall so require, shall make an order enjoining or excusing the attendance of any such under-tenant or ryot. If any under-tenant or ryot, after the issue of an order enjoining his attendance, neglects to attend and to point out the land, it shall not be competent to him to contest the correctness of the measurement made, or any of the proceedings held, in his absence.

Stamp required for applications under this Section.

This Section must be read in connection with Section 25, which declares that proprietors generally are entitled to make a measurement and general survey of their property, unless restrained from doing so by express agreement with the occupants of the land. Applications for assistance to measure under this and the following Section must be written on a stamp of the value in use for miscellaneous petitions to the Court. *Smith* v. *Mudun Lall*, 6, W. R., (Act X.) 13. And it has also been ruled, that any number of ryots can be included in one application, and that it is not necessary for the landlord to proceed by separate suit against each individual ryot. *Shoshee Booshun Banerjee*, 8, W. R., 94. A ryot who refuses to attend and point out his land, is declared to be incompetent of afterwards contesting the correctness of the measurement, or any of the proceedings held in his absence: but he would not be bound by such measurement, unless notice had been duly served upon him under this Section. *Jadub Chunder Halder*, 1, Board's Rep., 143.

Separate application for each ryot not necessary.

Measurement of land when it cannot be ascertained, who are the persons liable to pay rent.

Act VI., (B.C.) 1862, Sec. 10.

XXXVIII. If the proprietor of an estate or tenure, or other persons entitled to receive the rents of an estate or tenure, is unable to measure the lands comprised in such estate or tenure, or any part

thereof, by reason that he cannot ascertain who are the persons liable to pay rent in respect of the lands, or any part of the lands comprised therein, such proprietor or other person may apply to the Court which would have had jurisdiction in case a suit had been brought for the recovery of such lands, and such Court thereupon, and on the necessary costs being deposited therein by the applicant, shall order such lands to be measured, and shall cause a copy of such order to be transmitted to the Collector in whose jurisdiction the lands are situate, together with the sum so deposited for costs, and the Collector shall thereupon proceed to measure such lands, and shall ascertain and record the names of the persons in occupation of the same, or, on the special application of the proprietor or other person aforesaid, but not otherwise, shall proceed to ascertain, determine, and record the tenures and under-tenures, the rates of rent payable in respect of such lands, and the persons by whom respectively the rents are payable. If after due enquiry the Collector shall be unable to cause such lands to be measured, or to ascertain or record the names of the persons in occupation of the same, or if he shall (in any case in which such special application shall have been made as aforesaid) be unable to ascertain who are the persons having tenures or under-tenures in such lands, or any part thereof, then and in any such case such Collector may declare the same to have lapsed to the party on whose application such enquiry may have been made. If any person, within fifteen days after such Collector shall have recorded the name of such person as being in occupation of such land, or any part thereof, or shall have declared a tenure to have lapsed, shall appear and shew good and sufficient cause for his previous non-appearance, and satisfy such Collector that there has been a failure of justice, such Collector may, upon such terms or conditions as may seem fit, alter or rescind such order according to the justice of the case.

Detailed survey.

Every proprietor of an estate, whether his property has been let out to *putneedars*, or any other description of under-tenants, is entitled to make a general survey of his estate under Section 37; but it would seem that those persons only are allowed to make a detailed survey under this Section, who are in receipt of the rents from the occupiers of the soil.

This was very distinctly laid down by Kemp and Glover, JJ., in the case of *Dwarkanath Chuckerbutty*. "The plaintiff in this case," observed the Court, "is the *putneedar*. Between him and the ryot there is the *dur-putneedar* and the *Shikmee Talookdars*. Now the ryots are not liable to pay rent to the plaintiff. They pay to the *Shikmee Talookdar*, who pays to the *dur-putneedar*, who again pays to the *putneedar*. Section 10 (1), in our opinion, contemplates the case of a proprietor of an estate, who, by reason of inability to ascertain who are the persons liable to pay rent to him, is unable to measure his estate. The plaintiff cannot be ignorant of the person who is liable to pay rent to him, as he has given a *dur-putnee*: and his attempt, under Section 10, to get the Collector's assistance to a minute measurement of the landheld by each ryot, is simply with a view to harass and oppress them. He may be entitled to make a general survey of the land under Section 9 of the Act, but this he has not asked for." 8, W. R., 11. There can be no question that this ruling in some degree does violence to the wording of this Section. If a proprietor of an estate is entitled to make a general survey of his property, though an intermediate holder interposes between himself and the ryots, there is certainly nothing, so far as the wording of this Section is concerned, to debar him from making a detailed survey (2.) Applications under this, as under the preceding Section, must be written on stamp paper of the value prescribed for petitions to the Court in miscellaneous cases, (3) and any number of ryots can be proceeded against in one application. *Solano* v. *Soobrun Rai*, 6, W. R., (Act X.) 4. If the right of a proprietor to make a detailed survey of the land is disputed, on the ground that the estate belongs not to him, but to a third party, the Court will then have to determine whether the applicant or the objector is in possession. *Nundun Lall*, 7, W. R., 188.

Who are authorized to make.

Stamp.

Proprietor not in possession cannot measure.

XXXIX. The Collector shall, as soon as conveniently may be after he shall have finally completed any such measurement and record, return a copy thereof to the Court by which such measurement had been ordered, and such Court shall receive and record the same; and every decision of the Collector made in pursuance of the provisions of Section 38 shall be appealable, as if the same had been an order of the Court into which such copy had been returned, made upon the day on which such copy was so returned; but, save as aforesaid, every decision of such Collector made in pursuance of the provisions of Section 38 shall be final.

Proceedings on completion of such measurement.

(1.) Section 38 of this Act.
(2.) See the case of *Run Bahadoor Sing*. *Ante* page 57.
(3.) *Ante* page 71.

Collector's powers.

XL. The provisions of the said Act VIII. of 1859, and the Acts amending the same, or of any other Act or Acts for the time being in force in Civil Courts in Bengal, relating to the evidence of witnesses, to procuring the attendance of witnesses and the production of documents, and to the examination, remuneration, and punishment of witnesses, shall apply to all proceedings before any Collector under Section 18; and for the purposes aforesaid, the Collector shall have all the powers and authorities in and by such Acts or any of them conferred upon the Court.

Measurement to be made by the pergunnah pole.

XLI. All measurements made under this Act shall be made according to the standard pole of measurement of the pergunnah in which the land is situated.

Standard pergunnah pole.

When rent suits were exclusively cognizable by Collectors, it was held that there was no appeal from a Collector's order under this Section. "The Collector," observed L. S. Jackson, J., "is the depository of the standard pole of each pergunn h, and it is exclusively within his province to declare what the standard of each pole is" *Tarrucknath Mookerjea*, 5, W. R., (Act X.) 17. And in another case the same learned Judge expressed his opinion, that it mattered very little whether the measurement was made by one pole or another. "The learned Counsel," observed the Court, "refers to the anomaly and inconvenience of admitting the decision of a Collector on the question of the standard pole of measurement to be final. It appears to me that there will really be no inconvenience at all. It is really of not the least practical consequence to the ryot what the Zemindar finds to be the area of his holding, until the Zemindar goes on to enhance his rent upon the ground that he holds more land that he has been paying rent for. When the Zemindar sues to enhance under such circumstances as that, it must then be open to the ryot to contest the issue, whether, in fact, he has been so holding more land; and he will then have an opportunity of establishing judicially what the standard pole of the pergunnah really was." *Rakhal Dass Mookerjea*, 7, W. R., 239.

The responsibility of using the standard pole rests with Zemindar.

I ought, however, to mention that in one or two recent decisions it has been held that the "responsibility of measuring with the proper standard pole lies with the Zemindar," and that "the Collector has no jurisdiction to determine, in cases falling under Sections 37 and 38, what the standard of measurement is; that the direction contained in this Section was one obligatory on the Zemindar, and that it was not for the Collector to lay down *a priori* with what pole the measurement was to be made; but that all such questions were to be reserved for after proceedings, when action was taken on the result of the measurement obtained." In other words, the measurement is to be made by the pergunnah pole; and if the Zemindar chooses to measure by any standard other than the pergunnah standard, the ryot, when

proceedings are taken to enhance his rent, but not before, will be at liberty to call in question the correctness of the measurement. *Romanath Rukheet*, 11, W. R., 510, L. Jackson and Markby, JJ.; *Brijjo Kishore Sein, Id.*, 562.

Weight to be given to Canoongoes papers in fixing the standard.

In determining this question, I mean the length of the standard pole, due credit must be attached to the Canoongoes papers, which have always been recognized to be of great weight in questions connected with pergunnah rates, standards of measurements and similar statistics; and it is no ground for rejecting these papers, that the local *hât* does not correspond with the English cubit of 18 inches: for the *hât* varies in length in different pergunnahs. *Nund Duntput*, 2, W. R., (Act X.) 13. It sometimes, indeed, happens that there are two different standards of measurement in the same pergunnah; and when this is the case, the standard which is current in a particular locality or *tuppah* must be followed. *Bhogobutty Churn Bhuttacharjea*, 1, W. R., 225, and *Sarbanund Panda*, 4, W. R., (Act X.) 32.

Register of suits.

XLII. All suits brought under any of the provisions of this Act shall be entered in a special register of the Court kept for that purpose.

Form of plaint in suits for arrears of rent.

XLIII. In any suit hereafter to be brought for the recovery of an arrear of rent, the plaint shall specify the name of the village and estate, and of the pergunnah or other local division in which the land is situate, the yearly rent of the land, the amount (if any) received on account of the year for which the claim is made, the amount in arrear, and the time in respect of which it is alleged to be due. If the arrear is alleged to be due from any ryot, the plaint shall further specify the quantity of land; and where fields have been numbered in a Government Survey, the number (if it be possible to give it) of each field.

Act VI., (B. C.) 1862, Sec. 2.

The Court may in certain cases award to the plaintiff additional damages not exceeding 25 per cent.

XLIV. In any suit hereafter to be brought for rent under the provisions of this Act, if it shall appear to the Court that the defendant has, without reasonable or probable cause, neglected or refused to pay the amount due by him, and that he has not, before the institution of the suit, tendered such amount to the plaintiff or his duly authorized agent, or in case of the refusal of the plaintiff or such agent to receive the amount tendered, has not deposited such amount in the Court before the institution of the suit in manner

hereinafter mentioned, it shall be lawful for the Court to award to the plaintiff, in addition to the amount decreed for rent and costs, such damages, not exceeding twenty-five per centum on the amount of rent decreed, as the Court may think fit. These damages, if awarded, as well as the amount of rent and costs decreed in the suit, shall carry interest at the rate of twelve per centum per annum from the date of decree until payment thereof.

Under what circumstances damages are to be awarded.

This Section formed no part of Act X., 1859, and was passed under special circumstances, to enable the Courts to deal with cases in which tenants combined to withhold the payment of their rents. The penalties it imposes are highly penal, and cannot be awarded unless it is shewn that the tenant has, without reasonable or probable cause, neglected to pay the amount that is due. A man is not liable to damages, merely because he may from poverty, illness, or some unavoidable cause, have failed to pay his rent. Nor can damages be awarded unless they are specially claimed, and the absence of probable cause expressly alleged in the plaint. *Hora Mohun*, 1, Board's Rep., 200. It is for the Court to determine what is a reasonable and probable cause; but it has been held that the mere pendency of an enhancement suit is not of itself a sufficient excuse for a tenant omitting to pay or tender the rent which is admittedly due at the old rate. *Nobokanto Dey*, 1, W. R., 100.

Are in lieu of interest.

It must be borne in mind that damages under this Section are given in lieu of interest, and can only be awarded in addition to the *rent* and *costs of the decree* (1.)

Act VI., (B. C.) 1862, Sec. 3.

The Court may award compensation not exceeding 25 per cent. on the amount sued for, to a defendant improperly sued.

XLV. In any suit hereafter to be brought for rent under the provisions of this Act, if it shall appear to the Court that the plaintiff has instituted the suit against the defendant without reasonable or probable cause, or that the defendant had, before the institution of the suit, duly deposited in the Court, in the manner hereinafter mentioned, the full amount which the Court shall find to have been due to the plaintiff at the date of such deposit, it shall be lawful for the Court to award to the defendant, by way of compensation, such sum, not exceeding twenty-five per centum on the whole amount claimed by the plaintiff, as the Court may think fit; and such sum, with interest at the rate of twelve per centum per annum until payment thereof, shall be recoverable from the plaintiff

(1.) *Vide ante* page 52.

in like manner as sums ordered to be paid by decrees of such Court.

Under-tenant or ryot may, after tender, &c., pay into Court, without any action being brought against him, what he admits to be due to his Zemindar, &c.

XLVI. If any under-tenant or ryot shall, at the Mâl Cutcherry for the receipt of rents or other place where the rents of the land or other immoveable property held or cultivated by him are usually payable, tender payment of what he shall consider to be the full amount of rent due from him at the date of the tender to the Zemindar or other person in receipt of the rent of such land; and if the amount so tendered shall not be accepted, and a receipt in full shall not be forthwith granted, it shall be lawful for the under-tenant or ryot, without any suit having been instituted against him, to deposit such amount in the Court having jurisdiction to entertain a suit for such rent, to the credit of the Zemindar or other person aforesaid: and such deposit shall, so far as the under-tenant or ryot, and all persons claiming through or under him, are concerned, in all respects operate as, and have the full effect of, a payment then made by the under-tenant or ryot of the amount deposited to such Zemindar or other person. Act VI., (B. C.) 1862, Sec. 4.

Payment into Court to have effect of payment to Zemindar or other person entitled.

Proceedings on making a payment into Court and drawing out the money.

XLVII. Such deposit shall be received in such Court on the application of the under-tenant or ryot, or his agent, made in writing, and on the under-tenant or ryot, or his agent, making a declaration in the form, or, as nearly as circumstances will admit, in the form set forth in the Schedule (A) hereto annexed, and the Court shall give a receipt for the same under its seal. If the declaration shall contain any averment which the person making the declaration shall know or believe to be false, or shall not know or believe to be true, such person shall be subject to punishment according to the law for the time being in force for the punishment of giving or fabricating false evidence. Upon receiving the money so deposited, the Court shall issue a notice to the person to whose credit it has been deposited, in the form set forth in the Schedule (B) hereto annexed; Act VI., (B. C.) 1862, Sec. 5.

and such notice shall be served by the Court, without the payment of any fee, either upon the person to whom it is addressed, or upon his Naib, Gomashtah, or other agent; and in the absence of any such agent, it shall be served by sticking up a copy of the same in the said Court, and another copy upon the Mâl Cutcherry for the receipt of rents, or other place where the rents are usually paid for the land in respect of which the money has been deposited. If the person to whom such notice is issued, or his duly authorized agent, shall appear and apply that the money in deposit be paid to him, it shall be immediately made over to him.

Stamp on deposits.

These Sections have made one most important change in the law. Under the old procedure, a ryot who wished to deposit his rent had to make application to the Court in writing, upon paper bearing a stamp of such value as would be necessary on the institution of a suit for arrears of rent; under the law as it at present stands, such applications will be treated as miscellaneous petitions, and be written on stamp paper of the value of 8 annas. The rulings on the subject of deposits are arranged under Section 31 (1.)

Act VI., (B. C.) 1862, Sec. 7.

After action brought, defendant may pay into Court, without costs, money tendered before action brought.

XLVIII. The defendant in any suit instituted under any of the provisions of this Act, may, if he have duly tendered the same to the plaintiff before the institution of the suit, pay into Court such sum of money as such defendant may consider to be due to the plaintiff, without paying in any costs incurred by the plaintiff up to the time of such payment, and such sum shall be immediately paid out of Court to the plaintiff. If after such payment the plaintiff elects to proceed in the suit, and ultimately recovers no further sum than shall have been paid into Court, the plaintiff shall be charged with the whole costs of the suit incurred by the defendant; but if the plaintiff ultimately recovers a further sum than shall have been paid into Court, the defendant shall be charged with the whole costs of the suit.

Costs if plaintiff goes on and recovers no more.

Act VI., (B. C.) 1862, Sec. 8.

If no previous tender has been made, defendant may pay into Court what he admits to be due, with costs on that sum.

XLIX. The defendant, in any suit instituted under any of the provisions of this Act, may, without having made any tender before action brought, pay into Court such sum of money as he shall

(1.) *Ante* page 68.

consider to be due to the plaintiff, together with the costs (to be fixed by the Court, if necessary, as of a suit originally instituted for the amount so paid into Court) incurred by the plaintiff up to the time of such payment, and such sum shall immediately be paid out of Court to the plaintiff. If after such payment the plaintiff elects to proceed in the suit and ultimately recovers no further sum than shall have been paid into Court, he shall be charged with all costs incurred by the defendant subsequently to such payment; but if the plaintiff ultimately recovers a further sum than shall have been paid into Court, the defendant shall be charged with costs as upon a suit originally instituted, for the whole amount for which the plaintiff ultimately obtains a decree, but shall have credit thereout for the amount of costs paid into Court by him in the first instance.

Costs if plaintiff goes on with the suit.

L. No warrant of arrest before judgment shall be issued in a suit for arrears of rent due in respect of a dependent talook or other transferable tenure which may be liable to sale in execution of any decree which may be passed in the case.

No warrant of arrest before judgment.

As to what tenures are transferable. *Vide ante* Section 23, page 53.

LI. It shall be lawful for any person entitled to recover the possession of land under any of the provisions of this Act, to include in his plaint a claim for the mesne profits of the land.

Mesne profits may be claimed in suits for recovery of land.

LII. Any person desiring to eject a ryot or to cancel a lease on account of non-payment of arrears of rent, may sue for such ejectment or cancelment and for recovery of the arrear in the same action, or may adduce any unexecuted decree for arrears of rent as evidence of the existence of such arrear in a suit for such ejectment or cancelment. In all cases of such suits for the ejectment of a ryot or the cancelment of a lease, the decree shall specify the amount of the arrear, and if such amount, together with interest and costs of suit,

Act X., 1859, Sec. 78.

Suits for ejectment or cancelment of lease.

be paid into Court within fifteen days from the date of the decree, execution shall be stayed.

Equitable relief afforded by this Section extends to lease-holders.

This Section applies to all cases of suits for the ejectment of a ryot, or for the cancelment of a lease for the non-payment of rent. It applies not only to cases in which it is sought to eject a ryot, under Section 22, for non-payment of rent, or for the cancelment of a lease for non-payment of rent under Section 23, but also to cases in which it is sought to cancel a lease, or eject a ryot for non-payment of rent under an express stipulation contained in the agreement between the parties, that in the event of non-payment the lease shall be forfeited. The words are general "in all cases of suits," and not in all cases of suits brought for the purpose of enforcing the provisions of Section 23. *Jan Ali Chowdery*, 10, W. R., (F. B.) 12, Peacock, C. J.

Even if the lease stipulates that non-payment shall void the tenancy.

The law upon this point may now therefore be considered to be settled; and a tenant, whose lease expressly stipulates that the tenancy shall be void on the non-payment of the rent, can save himself from the consequences of his default by paying up the amount of the arrear within fifteen days from the date of the decree (1.) If the decree is altered or amended on review or appeal, the fifteen days' grace dates from the passing of the final decision in the case. *Rada Mohun Mundle*, Marsh. Rep., 471. And it matters not whether the amount of the decree is paid by the tenant sued, or by any other person intrusted in the holding. "The Act does not say that the arrear must be paid in by the tenant, or that it shall not be paid in by his transferee, or by any other party interested in saving a forfeiture of the tenure." *Saroda Prosad Rai*, Marsh. Rep., 417.

Court can extend the period of grace beyond 15 days.

It would seem that the Court, though it cannot shorten the period of grace which this Section allows, can in the exercise of its discretion stay execution for a longer period than fifteen days. This discretionary power is also vested in the Appellate Court. *Nobokisto Mookerjee*, 2, Wyman's Rep., (Act X.) 75.

Transferable tenures cannot be cancelled under this Section.

I have before observed (2) that middle-men who have a permanent or transferable interest in the land, are not liable to be ejected under this Section; their tenures must be brought to sale under Section 59. In connection with the subject of ejectment, the cases quoted under Sections 22 and 23 may be referred to.

Court to issue immediate execution in certain cases.

LIII. Whenever in any suit brought by any Zemindar or other person in receipt of the rent of land, to eject any cultivator not having a right of occupancy, or to eject any farmer or other tenant holding only for a limited period after the determination of his lease or tenancy, or any agent after the determination of his agency, or to enforce any attachment or ejectment expressly authorized by any Regulation or Act, the

(1.) See *Komola Sahoy*, 11, W. R., 201.
(2.) *Vide* page 53.

Court shall pass a decree in favor of the plaintiff, no application in the form provided in Section 212 of the said Act VIII. of 1859 shall be necessary, but the Court shall forthwith, upon the plaintiff depositing in Court the necessary expenses, make an order for delivery of possession in execution of the decree: Provided, however, that in cases to which Section 52 of this Act is applicable, no such order shall be made until after the expiration of fifteen days from the date of the decree.

In such cases execution not to be stayed pending appeal.

LIV. It shall not be lawful for the Court to entertain any application for stay of execution of any such order pending any appeal, and no person who shall have been evicted under any such order shall be restored to possession so long as the decree under which such order was issued shall remain unreversed.

Ejectment of non-occupancy ryots and under-tenants holding over after the lease has expired.

Sections 53 and 54 were substituted for Section 25, Act X., 1859, which authorized the Collector to grant summary assistance to any Zemindar who wished to eject a ryot, not having a right of occupancy, or an under-tenant holding over after the determination of his lease. Under the present procedure, a Zemindar who wishes to invoke the assistance of the Court must proceed by a regular suit for ejectment. If he obtains a decree, he will be entitled to ask for immediate execution, except in cases to which Section 52 is applicable. Now Section 52 must be read with Sections 22 and 23. Section 22 provides that no "ryot having a right of occupancy or holding under a pottah, the term of which has not expired, shall be ejected otherwise than in execution of a decree or order under the provisions of this Act." Similarly, Section 23 exempts from summary ejectment "farmers or other leaseholders not having a permanent or transferable interest in the land, whose lease is liable to be cancelled for non-payment of arrears of rent." These two classes of cases, therefore, would be those to which Section 52 is applicable, and in which immediate execution could not be given. In other cases, such, for instance, as cultivators not having a right of occupancy, or farmers or other tenants holding over after the termination of their lease or tenancy, immediate execution would issue on the passing of the decree. It will be observed that under Section 54, the Court which passes the decree can exercise no discretion in the matter of staying execution. It is only the Appellate Court that can in the exercise of its discretion stay execution of the decree.

Act X., 1859, Sec. 80.

If person required by the decree refuse to grant pottah, Court may do so.

LV. When a decree is given for the delivery of a pottah, if the person required by the decree to grant such pottah refuse or delay to grant the same, the Court may grant a pottah in conformity with the terms of the

decree under the signature and seal of such Court, and such pottah shall be of the same force and effect as if granted by the person aforesaid.

Act X., 1859, Sec. 81.

Refusal to execute kabuliat as required by the decree.

LVI. When a decree is given for the delivery of a kabuliat, if the person required by the decree to execute such kabuliat shall refuse to execute the same, the decree shall be evidence of the amount of rent claimable from such person, and a copy of the decree under the signature and seal of the Court shall be of the same force and effect as a kabuliat executed by the said person.

Act VI., (B. C.) 1862, Sec. 17.

Process not to issue simultaneously against both person and property.

LVII. Process of execution in any suit instituted under this Act may be issued against either the person or the property of a judgment-debtor, but process shall not be issued simultaneously against both the person and property.

Act X., 1859, Sec. 92.

No execution to be issued after three years from date of judgment.

LVIII. No process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in Sections 27, 28, 29, or 30 of this Act, after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding five hundred rupees, in which case the period within which execution may be had shall be regulated by the general rules in force in respect to the period allowed for the execution of decrees of the Court.

Cost of execution to be reckoned as part of the judgment.

In calculating whether a judgment exceeds Rs. 500, all costs, whether incurred before or after the decree, must be taken into consideration. Thus, where a judgment was under Rs. 500, but the value of the stamps incurred in taking out execution raised the amount to above Rs. 500, it was held that the judgment must be considered as one for a sum exceeding Rs. 500. "In deciding," observed the Court, "a general point of law of this description, we cannot do better than be guided by the general principles of law, which we find in Act VIII., 1859. Section 188 of that Act explains that under the denomination of costs, are included the whole of the expenses necessarily incurred by either party on account of the suit, and in enforcing the decree passed therein, such as the expense of stamps, &c. In any suit under Act VIII., 1859, it is clear from these Sections that the value of stamps required and used in enforcing a decree would be

held to be included in the judgment; and we would apply the same law to judgments in Act X. suits." *Campbell* v. *Abdul Huc*, 6, W. R., (Act X.) 8.

Where the judgment is for a sum not exceeding Rs. 500, no execution can be issued after the lapse of three years from the date of the decree. The meaning of this is, that no application can be *received* for the execution of such a decree after the lapse of three years; but an application, *presented before the lapse of three years*, can be carried out after that period has expired. "We think," observed Peacock, C. J., in the case of *Hera Lall Seal*, 6, W. R., (Act X.) 84, "that, giving a reasonable construction to the Section, the meaning is, that no execution shall issue upon a decree, unless a proper application for execution be made within three years from the date of the decree. If the meaning of the Section is that the warrant of execution must be signed within three years, a party might be deprived of the fruits of his judgment in a case in which he has to execute it against the heirs or representatives of the judgment-debtor, though he may have acted with the greatest diligence.....The Deputy Collector has declined to issue the warrant, on the ground that he has no jurisdiction to issue a warrant after three years from the date of the judgment, notwithstanding that the application was made to the Collector, and the *tullubana* lodged, within the period of three years. We think he had jurisdiction, and he must be directed to hear and determine the case upon its merits."

Application for execution, if presented before the lapse of three years, can be carried out after the expiration of three years.

The date of the judgment is the date of the final judgment in the case. Where a case has been appealed, the three years must be reckoned from the date of the decree of the Appellate Court. In all such cases the period of limitation runs, not from the date of the original decree, but from the date at which the appeal was determined. *Gyan Chunder Roy*, 7, W. R., 48, Peacock, C. J.

The three years must be reckoned from date of final judgment.

Procedure on sale of under-tenure.

LIX. Whenever a decree may be passed for an arrear of rent due in respect of an under-tenure which by the title deeds or the custom of the country is transferable by sale, and the judgment-creditor shall make application for the attachment and sale of such under-tenure, the Court shall, so soon as such under-tenure shall have been ordered to be sold, cause to be hung up in some conspicuous part of the building in which such Court sits, and of the buildings in which the Collector and Judge of the District, within which the land comprised in such under-tenure is situate, and to be affixed on some conspicuous place on such land, and on some conspicuous place in the town or village in or nearest to which such land is situate, a notice for the sale of such under-tenure on some fixed date not less than twenty days from the hanging up of such notice in such Court.

Transferable under-tenures hypothecated to landlord for rent.

All under-tenures which are transferable by sale, are hypothecated to the landlord for the rent; and the tenant cannot, by disposing of the tenure to a third party, deprive the landlord of his lien upon it. Thus, where the plaintiff had purchased under a Civil Court decree, the rights and interests of a tenant in a certain under-tenure, and this under-tenure was afterwards brought to sale for arrears of rent by the Zemindar, it was held that the purchaser under the Act X. sale, and not the plaintiff, was entitled to possession. *Khoobaree Rai*, 2, W. R., 131. Where, however, the rights and interests of a tenant in an under-tenure are sold by the Civil Court, and the Zemindar recognizes and adopts the purchaser as his tenant, giving him a new lease of the land, he cannot then proceed against the under-tenure for arrears which accrued before the purchaser came into possession. He must realize such arrears, as he would realize any other debt from the former tenant (1.) *Umurt Lal Bose*, 2, W. R., (Act X.) 86.

Tenure sold by Zemindar for arrears cannot be re-sold for previous arrears.

It has been held (*Mussamut Luteefun*, 6, W. R., 112) that a tenure purchased in execution of a decree for the current rent due therefrom, cannot again be resold for the arrears of rent which had accrued on account of arrears of former years. "The tenure itself," it was added, "is hypothecated for the rent of the current year, and can only be sold for arrears of the current year." It is submitted that this decision can hardly be supported upon the grounds stated in the judgment. There is no provision in the law which says that under-tenures can only be sold for arrears of the current year; on the contrary, they are liable to be sold for all arrears which are recoverable by law. The decision, however, is correct, and can be supported on clear principles. When a Zemindar brings an estate to sale for arrears of rent, and receives from the purchaser the price of the under-tenure, he thereby conveys the tenure to the purchaser, and the relationship of landlord and tenant is created from the date of the purchase. The new tenant would, of course, only be liable for arrears which accrued after his tenancy commenced: arrears which accrued before that date, could only be recovered as a personal debt from the former proprietor.

Sales impeachable for fraud.

The sale of an under-tenure in execution of a decree can, of course, be impeached on the ground of fraud; and a civil suit will in such cases lie to set the sale aside. When a decree of one Court, or an execution of a decree is obtained by fraud, the fraud gives a right of action to the party injured by it against the party guilty of the fraud. The Civil Courts, which have jurisdiction to administer the rules of equity, justice and good conscience, have power to set aside decrees obtained by fraud, and to restrain the parties to the fraud from reaping the fruits of it, by enforcing such decrees. *Nilmoney Bonik*, 5, W. R., (Act X.) 21, (F. B.)

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(1.) I ought here to notice the case of *Pran Bundhoo Sircar*, 10, W. R., 484, in which the Court (Phear and Hobhouse, JJ.) held that a Zemindar had no authority to bring an under-tenure to sale, after the rights and interests of the under-tenant had been sold in execution of a Civil Court decree. This ruling is opposed to a long course of decisions, and I think the Court must have overlooked the provisions of Section 106, Act X., 1859, (Section 63 of this Act); which applies to those cases in which the under-tenure is claimed by third parties; and it is particularly provided that no transfer of the under-tenure shall be recognized unless the transferee's name has been registered in the Zemindar's Sheristah.

Is sale under an ex-parte decree, which is afterwards set aside, valid?

But it would seem that a sale in execution of a decree can only be set aside for illegality or fraud. Thus, where a plaintiff had obtained an ex-parte decree against a defendant, and in execution of that decree had sold the defendant's under-tenure, and this ex-parte decree was afterwards set aside, it was held that the sale was valid, though the decree under which it had taken place was invalid, and the defendant was not allowed to recover the under-tenure: unless he could prove that the purchase was not a *bonâ fide* one; and that the purchaser was acting in collusion with the decree-holder. *Jan Ali*, 1, B. L. R., 56, Peacock, C. J. The learned Chief Justice, in delivering judgment, referred to the case of *Chunder Kanto Surma*, 7, W. R., 312, in which Norman, J., had made the following remarks:—"It is important to observe, that if a sale takes place in execution of a decree in force and valid at the time of the sale, the property in the thing sold passes to the purchaser; and if the decree or judgment be afterwards reversed, the reversal does not affect the validity of the sale or the title of the purchaser." It is submitted, however, that there is a marked difference between the two cases. Where a formal decree has been given in the presence of both parties, and a sale has taken place in execution of this decree, then, no doubt, the sale is valid, whether the decree is reversed on appeal or not. But this is not the case with an ex-parte decree. When an ex-parte decree is set aside, it is set aside because the proceedings *ab initio* are invalid; and if the decree and the attachment under that decree are invalid, surely the sale which follows the attachment must be invalid too. There must be, in the first instance, an attachment of the thing to be sold, and if there is no attachment, or an invalid attachment, the property cannot legally be sold. Where the provisions of the law have not been complied with, the sale is illegal. It is all very well to say that the purchaser under these ex-parte decrees is to be protected, but is not the unfortunate owner of the property deserving of some consideration? Is a man to be deprived of his property when no decree, or, at any rate, no valid decree, has been given against him? The remarks of Phear, J., in an analogous case, seems to me to have a very close bearing upon this subject. "There are two sets of grounds," observed that learned Judge, "upon which the Court may set aside its own decree within Section 119. The first is, that the summons was not duly served upon the defendant, who applies for a new trial: and the second that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing. If the Court is satisfied that either of these grounds is made out, it sets aside its original judgment and proceeds with the hearing of the suit. But the attachment of the 2nd February was issued in process of execution of the first decree. It owed its validity as an attachment entirely to the foundation afforded by the decree, and when that decree was set aside and declared invalid, the attachment, in our opinion, fell with it. Without a decree the attachment could not be made." *Lala Jagut Narayan*, 1, B. L. R., 71.

Contents of notice of sale of under-tenure.

LX. Every such notice shall specify in the words used in the plaint in the suit in which the decree was made, the name of the village, estate, and pergunnah, or other

local division in which the land comprised in the said under-tenures is situated, the yearly rent payable under the said under-tenure, and the gross amount recoverable under the said decree.

Under-tenures not to be sold while other execution in force.

LXI. No order for the sale of any such under-tenure shall be made in execution of a decree for recovery of arrears of rent payable in respect thereof, when a warrant of execution has been previously issued against the person or moveable property of the judgment-debtor, so long as such warrant remains in force. If, after sale of any such under-tenure in execution of such decree, any portion of the amount decreed remains due, process may be applied for, and issued against, any other property, moveable or immoveable, belonging to the debtor.

Immoveable property other than the under-tenure in arrear not to be sold till the moveable property is exhausted.

Section 57 enacts that process of execution may be issued against either the person or the property of a judgment-debtor, but not simultaneously against both person and property. Having laid down this general rule, Section 65 enacts that in the execution of any decree for the payment of money under this Act, not being money due as arrears of rent of a saleable under-tenure, the judgment-creditor may apply for execution against any immoveable property belonging to his debtor, if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor, within the district in which the suit was instituted. It is clear, therefore, that, as a general rule, process of execution for a money decree under this Act is not to be levied in the first instance by attachment of immoveable property. The Legislature seems to have been anxious to guard against the sale of immoveable property in execution of decrees in rent suits, until the moveable property should have been first exhausted. The only exception made is in the case of transferable under-tenures which can be sold in the first instance for their own arrears: but "no order for the sale of any such under-tenure can be made when a warrant of execution has been previously issued against the person or moveable property of the judgment-debtor so long as such warrant remains in force." "From which," observed Peacock, C.J., "I infer that the Legislature considered that no other execution could be issued before the application to sell the under-tenure, except an execution against the person or moveable property of the debtor. I can scarcely conceive that the Legislature, if they had considered that an attachment of the general immoveable property of the debtor might be made in the first instance, would not have provided that the under-tenure should not be sold so long as a warrant should remain in force against the other immoveable property, as well as when a warrant should remain in force against the moveable property. I therefore think that, even for arrears of

a saleable under-tenure, the other immoveable property of the debtor cannot be attached in the first instance." *Deanatulla*, 10, W., R., 341, 1, B. L. R., 216. Any Court which sold immoveable property without, in the first instance, proceeding against the moveable property or the under-tenure in arrear, would act without jurisdiction: and a suit would lie in the Civil Court to set aside the sale. *Jokee Lall*, 4, W. R., (Act X.) 4, Loch and Glover, JJ. I ought, however, to observe that it was held in a subsequent case (*Bhoojunga Thakoor*, 9, W. R., 80, Loch and Mitter, JJ.), that such a suit would not lie. It is submitted, however, that this latter decision is opposed to the F. B. Rulings in the case of *Byjnath Sahoo*, 10, W. R., 66, (F. B.), which clearly lays down that a suit will lie in the Civil Court to set aside a sale made without jurisdiction.

How the sale may be stayed by person interested in under-tenure.

LXII. If the sum due under the decree, together with interest to date of payment, and all costs of process, be paid into Court at any time before the sale commences, whether by the defaulting holder of the under-tenure, or any one on his behalf, or any one interested in the protection of the under-tenure, such sale shall not take place; and the provisions of Section 13 of Regulation VIII. of 1819, for the recovery of sums paid by person other than the defaulting holder of the under-tenure to stay the sale of the under-tenure, shall be applicable to all similar payments made under this Section.

Act X., 1859, Sec. 106.

If third party claim to be the lawful possessor of such under-tenure, Court to stay the sale and to enquire into and adjudicate upon the claim, upon decree being paid or secured.

LXIII. If after attachment and before sale of any such under-tenure as aforesaid in execution of a decree for arrears of rent due in respect of such under-tenure, any third party may prefer a claim alleging that such third party and not the person against whom the decree has been obtained is the proprietor of such under-tenure, and was in lawful possession of the same at the time when such decree was obtained, the Court shall not postpone such sale, unless and until such third party shall have deposited in Court the amount of the decree, or given sufficient security for the same. Provided, always, that no transfer of an under-tenure which, by the provisions of this Act or any other law for the time being in force, is required to be registered in the Sherishtah of the Zemindar or superior

Non-registered transfers not to be recognized.

tenant, shall be recognized unless it has been so registered, or unless sufficient cause for non-registration be shewn to the satisfaction of the Court.

An unregistered under-tenant cannot sue for reversal of a sale, except in cases of fraud.

Where a third party's tenure was attached and sold in his absence on a collusive decree, it was held that a suit in the Civil Court lay for the reversal of the sale. *Gunga Dass Dutt*, 7, W. R., 183, (F. B.) But in the absence of fraud, a third party, whose name was not registered in the Zemindar's Sherishtah, and who had not been recognized as the tenant, could not sue for the reversal of the sale. When, therefore, an unregistered tenant wishes to protect his under-tenure from sale, his only course is to deposit the amount of the decree under the last preceding Section : if in spite of the deposit the under-tenure is then sold, a suit will lie in the Civil Court to reverse the sale. *Sheik Afzul*, 6, W. R., (Act X.) 59, (F. B.) Though the law provides that no transfer of an under-tenure shall be recognized unless registered in the Zemindar's Sherishtah, still cases have occurred in which it has been held that the defect of non-registration can be cured by the recognition by the Zemindar of the transferee as his tenant. The mere knowledge on the part of the Zemindar that a certain person has purchased the tenure is not, however, sufficient. It must be shewn that the Zemindar has not only known of the transfer, but by receiving rent has accepted the transferee as his tenant. *Sarkies* vs. *Kalee Coomar Rai*, 2, Board's Rep., 157; *Nobo Coomar Ghose, Id.*, 165.

Or unless he has been recognized by the Zemindar as a tenant.

Act X., 1859, Sec. 108.

Execution of decrees given in favor of sharers in undivided estates or tenures.

LXIV. If a decree is given in favor of a sharer in a joint undivided estate, dependent talook, or other similar tenure, for money due to him on account of his share of the rent of an under-tenure situate in such undivided estate, talook or tenure, no order for the sale of such under-tenure in execution of such decree shall be made unless and until all moveable property (if any) which such judgment-debtor may possess within the jurisdiction of the Court in which the suit was instituted, shall have been seized and sold in execution of such decree, and the sale of such property (if any) shall have proved insufficient to satisfy the judgment. In such case, such under-tenure, if of the nature described in Section 59, may be seized and sold in execution of such decree, according to the ordinary procedure of the Court, and not in the manner provided in the said Section, and every such sale shall have such and the same effect as the sale of any immoveable property sold in execution of a decree not being for arrears of rent payable in respect thereof.

A sharer in a joint undivided estate, dependent talook, or other similar tenure, cannot cause the tenure itself to be sold in execution of a decree for his share of the rent, he can only sell the rights and interests of his tenant in such under-tenure, so far as his own share is concerned. The tenure will be sold under the ordinary procedure of the Court for the sale of immoveable property.

Execution of judgment.

LXV. In the execution of any decree for the payment of any money under this Act, not being money due as arrears of rent of a saleable under-tenure, if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor within the district in which the suit was instituted, the judgment-creditor may apply for execution against any immoveable property belonging to such debtor.

Purchaser to acquire the under-tenure, with certain exceptions, free of incumbrances.

Act VIII., (B.C.) 1865, Sec. 16.

LXVI. The purchaser of an under-tenure under the provisions of Sections 59 and 60 of this Act, shall acquire it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it, his representatives or assignees, provided that nothing herein contained shall be held to entitle the purchaser to eject khoodkast ryots or resident and hereditary cultivators, nor to cancel *bonâ-fide* engagements made with ryots or cultivators of the classes aforesaid by any holder of the under-tenure or his representatives, except it be proved in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rent would have been demandable at the time such engagements were contracted by his predecessor. Nothing in this Section shall be held to apply to the purchase of a tenure by the previous holder thereof, through whose default the tenure was brought to sale.

Under-tenures after a

This Section is a re-enactment of Section 16, Act VIII., 1865., (B. C.), and gives the landlord power to avoid all incumbrances created by

sale voidable at discretion of the purchaser.

the tenant, unless the making of such incumbrances has been expressly vested in the holder of the tenure. But it is important to remember that such incumbrances are not *ipso facto* void on a sale taking place, but are only voidable at the option of the purchaser. The under-tenures subsist until the purchaser gives notice of his intention to annul them. *Gobind Chunder Bose*, 11, W. R., 160; *Ram Chunder Banerjea*, 12, W. R., 153.

This right of cancellation to be exercised within a reasonable time.

This right of cancelling incumbrances must be exercised by the purchaser within a reasonable time. "The auction purchaser," observed Norman, J., in an analogous case, "had a right to avoid and annul all tenures which originated with the defaulter or his predecessor, and there is no doubt that in 1244 (the date of the sale) or within a reasonable time, or perhaps within such time as would be allowed by the law of limitation after that date, the auction purchaser might have avoided the tenure of the defendants. But as he did not do so, as he did not avail himself of the powers which the law gave him, within any such time, it is not open to any person now holding his estate, and still less to a mere lessee claiming under him, to avoid the tenure at the present day." *Tara Chand Dutt*, 7, W. R., 91.

With regard to the general powers of auction purchasers to avoid incumbrances, the following cases may with advantage be consulted :— *Ranee Shornomoyee*, Suth. Privy Council cases, 548 (1); and *Rajah Sutto Surrun Ghosal*, 11, W. R., Privy Council cases, 10. In the latter case their Lordships observed, that "justice and sound policy alike required that the stringent powers which were given to auction purchasers, should be exercised within a reasonable time, inasmuch as the law had given them for the particular purpose only of enabling the purchaser again to make the income of the estate an adequate security for the public revenue assessed upon it, and the exercise of such powers must necessarily cause great hardship to under-tenants, and insecurity to property."

Effect of sales upon under-tenures under the old procedure.

It must be borne in mind that under-tenures which were sold for arrears of rent before the passing of Act VIII., 1865, were not sold free from incumbrances, unless the right of selling them for arrears of rent had been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. "There were two classes of tenures," to quote the leading case upon this subject, "saleable for arrears of rent under Section 15, Regulation VII. of 1799, *viz.*, those in which the tenure was saleable by the stipulations in the title deeds, and those which were saleable by the established usage of the country. The former only were included in Section 8, Regulation VIII. of 1819; and it was only in respect of them, that the sale was declared by Section 15 of that Regulation to be free from incumbrances." *Sahabuddeen*, 7, W. R., 260, (F. B.)

Act VIII, (B.C.) 1865, Sec. 17.

Zemindar how to proceed, if purchaser do not register.

LXVII. The purchaser of an under-tenure sold under this Act shall apply to the Zemindar or other land-holder within fifteen days from the day of sale to

(1.) *Vide ante* page 39.

have his name registered in the Zemindar or other land-holder's books as the purchaser, and shall execute a kabuliat on the same terms and conditions on which the under-tenure was held by the defaulter; and if such application be not made within fifteen days, it shall be lawful for the Zemindar or other land-holder to sue the said purchaser for the delivery of a kabuliat.

Act X., 1859, Sec. 112.

Produce of the land to be held hypothecated for the rent.

Arrears of rent may be recovered by distraint under the following rules.

Cultivators who have given security to be exempt from distraint.

Proviso.

LXVIII. The produce of the land is held to be hypothecated for the rent payable in respect thereof; and when an arrear of rent, as defined in Section 21 of this Act, is due from any cultivator of land, the Zemindar, lakhirajdar, farmer, dependent talookdar, under-farmer, or other person entitled to receive the rent of such land immediately from the actual cultivator thereof, instead of bringing suit for the arrear as hereinbefore provided, may recover the same by distraint and sale of the produce of the land on account of which the arrear is due, under the following rules:—provided always that, when a cultivator has given security for the payment of his rent, the produce of the land for the rent of which security has been given, shall not be liable to distraint. Provided also that no sharer in a joint estate, dependent talook, or other tenure in which a division of lands has not been made amongst the sharers, shall exercise the power of distraint otherwise than through a manager authorised to collect the rents of the whole estate, talook, or tenure, on behalf of all the sharers in the same.

Act X., 1859, Sec. 113.

No distraint in certain cases.

LXIX. Distraint shall not be made for any arrear which has been due for a longer period than one year, nor for the recovery of any sum in excess of the rent payable for the same land in the preceding year, unless a written engagement for the payment of such excess has been executed by the cultivator.

Act X., 1859, Sec. 114.

Power of distraint to be exercised by managers under the Court of Wards, &c.

LXX. The power of distraint vested by Section 68 in Zemindars and other persons entitled to receive rent from cultivators of land, may be exercised by managers under the Court of Wards, Surburakars, and Tehseeldars of estates held under khas management, and other persons lawfully entrusted with the charge of landed property; and also by Naibs, Gomashtahs, and other agents employed by any such persons as aforesaid in the collection of rent, if expressly authorised by power of attorney in that behalf: Provided that if any illegal act is committed by any such Naib, Gomashtah, or other agent under color of the exercise of the said power, the person employing such agent shall be liable, as well as the agent, for any damages accruing by reason of such act.

Proviso.

Gomashtahs cannot distrain unless specially authorized.

Gomashtahs employed in the collection of rent are not permitted to distrain, unless "expressly authorized by power of attorney in that behalf." To distrain for rent is not within the general scope of a Gomashtah's authority, and the landlord would not, therefore, be liable for the acts of a Gomashtah, who had not been expressly authorized by him to distrain. Where, however, a landlord did actually order the Gomashtah to make the distress, he would be liable for the illegal distress, although it was not made under a written authority. So if the Gomashtah paid to the landlord the proceeds of the distress, and the landlord received such proceeds, knowing that they had been obtained by distress, he would, by thus accepting and ratifying the act of the Gomashtah, render himself as responsible for the act of the Gomashtah, as if he had expressly authorized the illegal act. *Ramjoy Mundle*, Marsh. Rep., 282, Peacock, C. J.

Ratification of illegal distress by landlord.

Act X., 1859, Sec. 115.

Standing crops, and crops gathered but not stored, liable to distraint.

LXXI. Standing crops and other ungathered products of the earth, and crops or other products when reaped or gathered, and deposited in any threshing-floor or place for treading out grain, or the like, whether in the field or within a home-stead, may be distrained by persons invested with the powers of distraint under the provisions of this Act. But no such crops or products other than the produce of the land in respect of which an arrear of rent is due, or of land held under the same engagement, and no grain or other produce after it has been stored by the cultivator, and no other property whatsoever, shall be liable to distraint under this Act.

Defaulter to be served with a written demand, &c., before or at the time of distraint.

LXXII. Before or at the time when distraint is made under this Act, the distrainer shall cause the defaulter to be served with a written demand for the amount of the arrear, together with an account exhibiting the grounds on which the demand is made. The demand and account shall, if practicable, be served personally on the defaulter, or, if he abscond or conceal himself, so that they cannot be so served, shall be affixed at his usual place of residence. Act X., 1859, Sec. 116.

Distress to be proportionate to the arrear if not paid or tendered.

LXXIII. Unless the amount of the demand is immediately paid or tendered, the distrainer may distrain property as aforesaid of value proportionate to the amount of the arrear with costs of the distress; and shall prepare a list or description of the said property, and deliver a copy of the same to the owner, or, if he be absent, affix it at his usual place of residence. Act X., 1859, Sec. 117.

Standing crops, &c., when attached, to be reaped and stored by the cultivator, or, if he neglect to do so, by the distrainer.

LXXIV. Standing crops and other ungathered products may, notwithstanding the distraint, be reaped and gathered by the cultivator, and may be stored in such granaries or other places as are commonly used by him for the purpose. If the cultivator neglect to do so, the distrainer shall cause the said crops or products to be reaped or gathered, and in such case shall store the same either in such granaries or other places as aforesaid, or in some other convenient place in the neighbourhood. In either case the distrained property shall be placed in the charge of some person appointed by the distrainer for the purpose. Crops or products, which from their nature do not admit of being stored, may be sold, before they are cut or gathered, under the rules hereinafter provided; but in such case the distraint shall be made at least twenty days before the time when the crops or products, or any part of the same, would be fit for cutting or gathering. Act X, 1859, Sec. 118.

Act X., 1859, Sec 119

Distrainer may apply for aid to the Court upon occasion of resistance made or apprehended

LXXV. If a distrainer shall be opposed, or shall apprehend resistance, and shall desire to obtain the assistance of a public officer, he may apply to the Court, which under the provisions of this Act would have jurisdiction to entertain a suit for the rent for which such distrainer is about to distrain, and the Court may, if it thinks necessary, depute an officer to support the distrainer in making the distraint.

Act X, 1859, Sec. 120.

Persons empowered to distrain may give written authority to their servants to do so.

LXXVI. When any person, empowered to distrain property under Section 68 or Section 70, shall employ a servant or other person to make the distress, he shall give to such servant or person a written authority (which may be on plain paper) for the same, and the distress shall be made in the name and on the responsibility of the person giving such authority.

Act X, 1859, Sec 121.

Distress to be withdrawn if defaulter tender payment of arrear and expenses of attachment prior to the day of sale.

LXXVII. If at any time after property has been distrained, and prior to the day fixed for its being put up to sale as hereinafter provided, the owner of the property shall tender payment of the arrear demanded of him and of the expenses of the distress, the distrainer shall receive the same, and shall forthwith withdraw the distress.

Act X, 1859, Sec 122.

Application for sale.

LXXVIII. Within five days from the time of the storing of any distrained crops or products, or if the crops or products do not from their nature admit of being stored, within five days from the time of making the distress, the distrainer shall apply for sale of the same to the Court, which would have jurisdiction to entertain a suit for the rent for which the distress was made.

Act X, 1859, Sec 123.

Form of application.

LXXIX. The application shall be in writing, and shall contain an inventory or description of the property distrained, the name of the defaulter and his place of residence, the amount due, and the date of the distress, and the place

Cost of notice upon defaulter to be deposited by distrainer.

in which the distrained property is deposited. Together with the application, the distrainer shall lodge in Court the amount necessary for the service of a notice upon the defaulter as hereinafter provided.

Act X., 1859, Sec. 124.

Procedure by Civil Court on receipt of application.

LXXX. Immediately on receipt of any application under the provisions of the next preceding Section, the Court, to which such application shall have been made, shall appoint an officer to conduct the sale of such property, and shall cause to be served a notice [which shall be in the form contained in the Schedule (C) to this Act, or to the like effect] on the person whose property has been distrained, requiring him either to pay the amount demanded, or to institute a suit to contest the demand before such Court within the period of fifteen days from the receipt of the notice; and shall at the same time cause to be affixed upon some conspicuous place in the Court-house, a proclamation fixing a day for the sale of the distrained property, which shall not be less than twenty days from the date of the application; and shall deliver a copy of the proclamation to the peon charged with the service of the notice, to be put up by him in the place where the distrained property is deposited. The proclamation shall contain a description of the property, the demand for which it is to be sold, and the place where the sale is to be held.

Act X., 1859, Sec. 125.

Sale to be suspended when suit instituted.

LXXXI. If a suit shall be instituted in pursuance of the aforesaid notice, the Court shall suspend proceedings in regard to the sale of the distrained property, and shall certify to the officer appointed to conduct the sale of such suspension.

Act X., 1859, Sec. 126.

Suit to contest distrainer's demand before issue of notice of sale.

LXXXII. Any person, whose property has been distrained in the manner in this Act provided, may institute a suit to contest the demand of the distrainer immediately after the distraint of his property, and before the issue of notice of sale; when such suit is instituted, the Court shall suspend proceedings in respect of the sale of such property.

Act X., 1859, Sec. 127.

Distress to be withdrawn on receipt of Court's certificate that the owner has executed a bond to pay amount of decree with interest and costs.

LXXXIII. The person whose property has been distrained may, at the time of instituting any such suit as aforesaid, or at any subsequent period, execute a bond with sufficient security, binding himself and his sureties to pay whatever sum may be adjudged to be due from him with interest and costs of suit: and when such bond is executed, the Court shall give to the owner of the property a certificate to that effect, or, if so requested, shall serve the distrainer with notice of the same, and upon such certificate being presented to the distrainer by the owner of the property, or served on him by order of the Court, the property shall be released from distraint.

Value of claim in suits disputing distress.

LXXXIV. The estimated value of the claim made in any suit filed under the provisions of Sections 80, 82, and 96, or any of them, shall be deemed to be the amount of arrears of rent for which the distraint shall have been made.

Act X, 1859, Sec. 128.

On expiration of period fixed in the proclamation of sale, if institution of suit to contest distrainer's demand have not been certified, sale may be proceeded with.

LXXXV. On the expiration of the period fixed in the proclamation of sale, if a suit to contest the demand of the distrainer be not in the meantime instituted in the Court and certified to the officer appointed to conduct the sale, such officer shall, unless the said demand, with such costs of the distress as shall be allowed by him, be discharged in full, proceed to sell the property, or such part of it as may be necessary, in the manner hereinafter prescribed.

Act X, 1859, Sec. 129.

Place and manner of sale of distrained property

LXXXVI. The sale shall be held at the place where the distrained property is deposited, or at the nearest gunge, bazar, haut, or other place or public resort, if the officer appointed to conduct the sale should be of opinion that it is likely to sell there to better advantage. The property shall be sold by public auction in one or more lots, as such officer holding the sale may think advis-

able; and if the demand with the costs of distress and sale be satisfied by the sale of a portion of the property, the distress shall be immediately withdrawn with respect to the remainder.

LXXXVII. If on the property being put up for sale, a fair price, in the estimation of the officer holding the sale, be not offered for it, and the owner of the property or some person authorised to act on his behalf apply to have the sale postponed until the next day or the next market day, if a market be held at the place of sale, the sale shall be postponed until such day, and shall be then completed, at whatever price may be offered for the property. Act X., 1859, Sec. 130.

If fair price be not offered, sale may be postponed to another day, and shall be then completed, at whatever price may be offered.

LXXXVIII. The price of every lot shall be paid for in ready money at the time of sale, or as soon after as the officer holding the sale shall think necessary; and in default of such payment, the property shall be put up again and sold. When the purchase-money has been paid in full, the officer holding the sale shall give the purchaser a certificate describing the property purchased by him and the price paid. Act X., 1859, Sec. 131.

Payment of purchase-money.

LXXXIX. From the proceeds of the sale of distrained property, the officer holding the sale shall make a deduction at the rate of one anna in the rupee on account of the costs of the sale, and shall transmit the amount to the Court, in order that it may be credited to Government. He shall then pay to the distrainer the expenses incurred by the distrainer on account of the distress and of the issue of the notice and proclamation of sale prescribed in Section 80, to such amount as, after examination of the statement of expenses furnished by the distrainer, he shall think proper to allow. The remainder shall be applied to the discharge of the arrear for which the distraint was made, with interest thereupon up to the day of sale; and if there be any overplus, it shall be delivered to the person whose property shall have been sold. Act X., 1859, Sec. 132.

Proceeds of sale.

Act X., 1859, Sec. 133.

Officers holding sales prohibited from purchasing.

XC. Officers holding sales of property under this Act, and all persons employed by or subordinate to such Officers, are prohibited from purchasing, either directly or indirectly, any property sold by such Officers.

Act X., 1859, Sec. 134.

All irregularities to be reported to the Court.

XCI. Officers holding sales of distrained property are required to bring to the notice of the Court any material irregularities committed by distrainers under color of this Act: and if in any case, on proceeding to hold a sale of property, such Officer shall find that the owner of the property has not received due notice of the distress and intended sale, he shall postpone the sale and report the case to the Court, and the Court shall direct the issue of another notice and proclamation of sale under Section 80, or pass such other order as may seem proper.

Act X., 1859, Sec. 135.

Recovery of expenses if Officer proceed to place of sale and no sale take place.

XCII. When any such Officer has proceeded to any place for the purpose of holding a sale, and no sale takes place either for the reason stated in the last preceding Section, or because the demand of the distrainer has been previously satisfied, no intimation of such satisfaction having been given by the distrainer to such Officer, the charge of one anna in the rupee on account of expenses shall be leviable, and shall be calculated on the estimated value of the distrained property. If the demand of the distrainer be not satisfied until the day fixed for the sale, the charge for expenses shall be paid by the owner of the property, and may be recovered by the sale of such portion thereof as may be necessary. In all other cases the Court shall make an order that such expenses shall be paid by the distrainer, and shall in such order fix the amount to be paid by him; such amount not to exceed the sum of ten rupees: and the amount by such order directed to be paid may be recovered from such distrainer as if such order were a decree of such Court.

Act X., 1859, Sec. 136.

Proceedings of Officers, &c., subject to revision and orders of Court.

XCIII. All proceedings, under this Act, of the Officers appointed to hold sales of distrained property, shall be subject to the revision and orders of the Court

to which they respectively are attached, and the Court may require the submission of such reports and statements of business performed by such Officers as may be thought necessary.

Act X., 1859, Sec. 137.

Second proclamation of sale.

XCIV. When a suit has been instituted to contest the demand of a distrainer, and the property has not been released on security, if the demand or any portion of it shall be adjudged to be due, the Court shall issue an order to the Officer appointed to conduct the sale of such property and furnish a copy of such order to the distrainer, authorising the sale of the property: and on the application of the distrainer, which shall be made within five days from the receipt by him of such copy of such order, such Officer shall publish a second proclamation in the manner prescribed in Section 80, fixing another day for the sale of the distrained property, which shall not be less than five nor more than ten days from the date of the proclamation; and unless the amount adjudged to be due with the costs of distress, including any costs of suit which may be ordered to be paid by the person instituting such suit, be paid intermediately, shall proceed to sell the property in manner hereinbefore provided.

Act X., 1859, Sec. 138.

Procedure after institution of suit to contest distrainer's demand.

XCV. In all suits instituted to contest the demand of a distrainer, the distrainer shall be required to prove the arrear in the same manner as if he had himself instituted a suit for the amount. If the demand, or any part thereof is found to be due, the Court shall make a decree for the amount in favor of the distrainer, together with such costs of suit as to such Court may seem proper, and the amount may be recovered by sale of the property as provided in the last preceding Section if the distress has not been withdrawn, and if any balance remain due after such sale, by execution of the decree against the person and any other property of the defaulter, or if the property has been released on security, by execution of the decree against the person and property of the defaulter and of his surety. If, on the other hand, the distraint is adjudged to be vexatious or

groundless, the Court, besides directing the release of the distrained property, may award such damages in favor of the plaintiff as the circumstances of the case shall seem to require, and may decree the cost of the suit to be paid by the distrainer.

Act X., 1859, Sec. 139.

Any person, whose property has been distrained for arrears of rent alleged to be due from another, may institute a suit against the distrainer.

XCVI. If any person shall claim as his own, property which has been distrained for arrears of rent alleged to be due from any other person, such person may institute a suit against the distrainer, and such other person to try the right to the possession of the property in such Court, and in like manner and under the same conditions as to the time of instituting the suit and to the consequent postponement of sale, as a person whose property has been distrained for an arrear of rent alleged to be due from him may institute a suit to contest the demand. When any such suit is instituted, the property may be released upon security being given for the value of the same. If the claim is dismissed, the Court shall make an order for the sale of the property or the recovery of the value thereof, as the case may be, for the benefit of the distrainer, and for payment of such costs of suit to such distrainer, as to such Court shall seem fit. If the claim is upheld, the Court shall decree the release of the distrained property with costs, and such damages (if any) as the circumstances of the case may seem to require. Provided always that no claim to any produce of land liable to distrant under this Act, which at the time of the distress may have been found in the possession of a defaulting cultivator, whether such claim be in respect of a previous sale, mortgage, or otherwise, shall bar the prior claim of the person entitled to the rent of the land; nor shall any attachment in execution of a judgment or decree of any Court prevail against such prior claim.

Act X., 1859, Sec. 141.

Persons prevented from suing in time to save their property from sale, may sue for damages.

XCVII. If any person, whose property has been distrained for the recovery of a demand not justly due, or of a demand due or alleged to be due from some other person, is prevented by any

sufficient cause from bringing a suit to contest the demand or to try the right to the property, as the case may be, within the period allowed by Sections 82 and 96, and his property is in consequence brought to sale, he may nevertheless, institute a suit under this Act to recover damages for the illegal distress and sale of his property.

Act X., 1859, Sec. 142.

Also persons aggrieved by any illegal act of distrainer.

XCVIII. If any person empowered to distrain property, or employed for the purpose under a written authority by a person so empowered, shall distrain or sell, or cause to be sold, any property for the recovery of an arrear of rent alleged to be due otherwise than according to the provisions of this Act, or if any distrained property shall be lost, damaged, or destroyed by reason of the distrainer not having taken proper precautions for the due keeping and preservation thereof, or if the distraint shall not be immediately withdrawn when it is required to be withdrawn by any provision of this Act, the owner of the property may institute a suit under this Act to recover damages for any injury which he may have thereby sustained.

Act X., 1859, Sec. 143.

Unlawful distraint.

XCIX. If any person not empowered to distrain property under Sections 68 and 70 of this Act, nor employed for the purpose under a written authority by a person so empowered, shall under color of this Act distrain, or sell, or cause to be sold any property, the owner of the property may institute a suit under this Act to recover damages from such person for any injury which he may have sustained from the distraint or sale. The said person shall, when the act complained of does not amount to criminal trespass, be liable to fine, which may extend to three hundred rupees or to imprisonment, simple or rigorous, which may extend to two months, or to both, in addition to any damages which may be awarded against him in such suit.

Penalty for illegal distraint.

Section 98 contemplates the case of persons having authority to distrain, but who distrains otherwise than according to the provisions of the Act. Section 99 contemplates the case of persons not empowered to distrain, but who under color of the Act do distrain. In the former case the distrainer is liable to a civil action, in the

latter, he is liable not only for damages, but also to a criminal prosecution for trespass. *Radha Mohun Lushkar*, 12 W. R., 68; *Joy Lall Sheik*, 9, W.R., 162.

Act X., 1859, Sec. 144.

Time for commencing suits for damages.

C. Provided always that any suit which may be instituted under any of the last three Sections shall be commenced within three months from the date of the occurrence of the cause of action.

Date from which the three months are to be reckoned.

The three months are not necessarily to be reckoned from the date of the distraint. Thus, where property was attached on the 2nd April, 1861, and was liberated from attachment on the 24th June, it was held that a suit for damages for the illegal distress and detention of the property was within time, if brought within three months from the 24th June. *Thukree Rai*, Marsh. Rep., 470.

Act X., 1859, Sec. 145.

Procedure on resistance to distraint, &c.

CI. If any person shall resist a distraint of property duly made under this Act, or shall forcibly or clandestinely remove any distrained property, the Court which would have jurisdiction in a suit for the rent for which such distraint was made, shall, upon complaint being made within fifteen days from the date of such resistance or removal, cause the person accused to be arrested; and if the offence be proved, and the offender be the owner of the property, shall order him to be imprisoned in the Civil Jail for six months, or until the whole arrear due to the distrainer, with all expenses and costs, shall be paid or levied by attachment and sale of the property of the offender under warrant of the Court. If the person convicted of the offence be any other than the owner of the property, he shall make good to the distrainer the value of the same, and shall further be liable to a fine not exceeding one hundred rupees, or, in default of payment thereof, to imprisonment for a period not exceeding two months.

No appeal from any decree of the District Judge for money below Rs. 100, unless it involve the right to enhance rent or a title to land.

CII. Nothing in this Act contained shall be deemed to confer any power of appeal in any suit tried and decided by a District Judge, originally or in appeal, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees, in which suit a question of right to enhance, or vary the rent of a ryot

or tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has not been determined by the judgment.

Review of judgment.

CIII. No application for a review of any judgment or order passed in any suit brought under the provisions of this Act, shall be received by any Court after the expiration of thirty days from the date of such order or judgment, but nothing in this Section contained shall be deemed to apply to the High Court of Judicature at Fort William in Bengal.

Small Cause Court not to have jurisdiction.

CIV. Nothing in this Act contained shall be deemed to confer upon any Court, sitting as a Court of Small Causes, cognizance of any suit brought under the provisions of this Act, of which it would not have had cognizance if this Act had not been passed.

Power to issue process free of charge.

CV. If in any case the Court is satisfied that a party is unable to pay the cost of any necessary process in any suit under this Act, it may direct such process to be served free of charge.

Application of Act.

CVI. This Act shall take effect in those Districts in the Provinces subject to the Lieutenant-Governor of Bengal to which the said Lieutenant-Governor shall extend it by an order published in the *Calcutta Gazette*, and thereupon this Act shall commence and take effect in the Districts named in such order at the day and time which shall be in such order provided for the commencement thereof.

Certain enactments to cease to have operation in places in which this Act takes effect.

CVII. When and so soon as this Act shall commence and take effect in any District, the various provisions mentioned in Schedule (D) hereto annexed, shall cease to have operation or effect in such District, save so far as they repeal or modify any other Regulations or Acts, and save so far as regards suits or

proceedings, which, before the time of the commencement of this Act, shall have been instituted before any Collector.

Pending suits to be carried on under former practice.

CVIII. Whenever any suit or other proceeding under the provisions of the Acts in the Schedule (D) mentioned, or of any of them, shall at the time when this Act comes into operation in any place have been instituted before any Collector or other Officer, having under the provisions of the same Acts or of any of them, jurisdiction in such suit or proceeding, such suit or proceeding and all appeals therein shall be heard and determined, and execution of any decree or order therein shall be had, and the practice and procedure therein shall be such and the same, as if this Act had not been passed.

Act not to affect powers conferred by the Chota-Nagpore Tenures' Act.

CIX. Nothing in this Act contained shall be deemed to take away or abridge any power or authority conferred by an Act passed by the Lieutenant-Governor of Bengal in Council, entitled an Act to ascertain, regulate, and record certain tenures in Chota-Nagpore, on any person appointed to be a Special Commissioner thereunder, or on the Commissioner of the Division of Chota-Nagpore.

Act VII. of 1868 saved.

CX. Nothing in this Act contained shall in any way affect any of the provisions of Act VII. of 1868 of the Council of the Lieutenant-Governor of Bengal for the recovery of arrears of land revenue, and other demands recoverable as arrears of land revenue.

Short title.

CXI. This Act shall be called "The Landlord and Tenant Procedure Act, 1869."

## SCHEDULE A.

*(Referred to in Section XLVII.)*

I., A. B., of, &c., do solemnly declare that I did personally (or by my Agent, C. D), on the day of tender payment to E. F. at his Mâl Cutcherry (or at ) the place where the rent of the lands at held or cultivated by me under or from the said E. F. are usually payable, of the sum of Rupees as and for the whole amount due from me in respect of the rent of the said lands from the month of to the month of both inclusive. I further declare that the said E. F. refused to accept the said sum so tendered (or to give me a receipt in full forthwith for the same); and I do declare that, to the best of my belief, the sum of Rupees so tendered, and which I now desire to pay into Court, is the full amount which I owe the said E. F. on account of the rent of the said lands from the month of to the month of both inclusive, and that I owe the said E. F. no further sum on account of the rent of the said lands.

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## SCHEDULE B.

*(Referred to in Section XLVII.)*

Court of

Dated the day of 18

To E. F. of, &c.,

With reference to the within declaration, you are hereby informed that the sum of Rupees therein mentioned is now in deposit in this Court, and that the above sum will be paid to you or to your duly authorized Agent on application; and take notice that if you have any further claim or demand whatsoever to make against the said A. B. in respect of the rent of the said lands, you must institute a suit in Court for the establishment of such claim or demand within six calendar months from this date, otherwise your claim will be for ever barred.

[Copy of declaration in Schedule A. to be annexed.]

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## SCHEDULE C.

*(Referred to in Section LXXX.)*

FORM OF NOTICE TO OWNER OF DISTRAINED PROPERTY.

Court of

A. B., Distrainer.

*(Name, description, and address of the owner of the property.)*

Whereas the said A. B. has applied to have the distrained property specified below sold for the recovery of alleged to be due to him as arrears of rent, you are hereby required either to pay the said sum to the said A. B., or to institute a suit in the Court of to contest the demand within fifteen days from the receipt of this notice, failing which the property will be sold.

Dated this day of 18 .

**Schedule D.**—*(Referred to in Sections CVII. and CVIII.)*

*Being Acts made inoperative in Districts in which this Act is in force.*

| Date and No. of Act. | Title of Act. | Extent of Repeal. |
|---|---|---|
| Act X. of 1859... ... ... | An Act to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal. | The whole Act. |
| Act VI. of 1862, passed by the Lieutenant-Governor of Bengal in Council. | An Act to amend Act X. of 1859. | The whole Act. |
| Act IV. of 1867, passed by the Lieutenant-Governor of Bengal in Council. | An Act to explain and amend Act VI. of 1862, passed by the Lieutenant-Governor of Bengal in Council, and to give validity to certain judgments. | The whole Act. |

# INDEX.

[*The Numerals refer to the Section of the Act, the Figures refer to the Page of the Book.*]


ABATEMENT.

grounds of, XIX.

dimunition of area, 47.

diluvion, 48, 49.

land taken up by Government for a road, 48.

dispossession from defect in lessor's title, 48, 49.

on what principle to be made, 48.

limitation in suits for, 48.

can be claimed in a suit for arears, 48.

all ryots or under-tenants can sue for, 49.

zomindar cannot sue Government for, 50.

ACCOUNTS, see *Agent.*

ACCRETIONS TO UNDER-TENURES.

belong to under-tenant, if possessing a permanent interest in the land, 34, 35.

but are liable to assessment, 34, 35.

ACT.

application of, CVI.

former enactments repealed by, CVII.

title of, CXI.

ACT OF GOD.

tenant not liable for rent if damage is done to land by, 49.

ADJACENT PLACES.

meaning of term, 42.

ADVERSE POSSESSION.

meaning of term explained, 45.

neglect of tenant to pay rent for 12 years does not constitute an, 63.

AGENT.

undisclosed principal of, can be sued by landlord for rent, 60.

meaning of, under this Act, 64.

powers of, 65, 66.

cannot grant a lease unless specially authorized, 65.

but lease, if ratified by landlord, is valid, 65.

AGENT.—*Continued.*
what amounts to ratification, 66.
liabilities of, 66.
authorized disbursements by, 66.
limitation in suits against, XXX.
where agent is suspended or absconds, 67.
where a settlement of account takes place, 67.
in cases of fraud or fraudulent accounts, 67.
due diligence to be used in discovering fraud, 67.
can conduct suits if specially authorized, XXXII.
but suit must be brought in name of principal, 69.
and the special authority must be stamped, 69.
cannot distrain unless specially authorized, LXX.
ratification of agent's acts by landlord, 92.
can delegate to under-servant power of distraint, LXXVI.
ALLUVION, see *Accretion.*
APPEAL.
does not lie from order of Judge in suits not exceeding Rs. 100, CII.
unless question of title, &c., is involved, CII.
APPROPRIATION OF PAYMENTS.
to be made by debtor, 25.
if he omits to do so, creditor can apply payment, 25.
if neither party makes application, law appropriates payment to earlier debt, 25.
AREA, see *Excess Land.*
ARREARS OF RENT.
definition of, XXI.
courts can award interest on, 52.
but not in addition to damages, 52.
limitation in suits for, XXIX.
arrears for four years when recoverable, 62.
suits for, at enhanced rates to be brought after notice within three months from end of year, XXIX, 63.
reversal of sale of tenure for, gives a fresh cause of action, 62.
ARREST BEFORE JUDGMENT.
not permitted in suits for arrears due from intermediate tenures, L.

ASSESSMENT.
of lakhiraj land,
right to make, to be determined before a suit for Rabuliat will lie, 21.
by collector under Reg. VII., 1822.
creates relation of landlord and tenant, 29.
of accretions how to be made, 34-35.
AUCTION-PURCHASER, see also *Sale.*
under Act XI., 1859.
can cancel under-tenures, 39.
but must exercise his right within a reasonable time, 40.
of under-tenure sold for arrears
acquires it free from encumbrances, LXVI.
certain encumbrances protected, LXVI.
voidable encumbrances to be voided within reasonable time, 90.
of under-tenures sold under the old procedure.
power of, in cancelling under-tenures, 90.
to apply to zemindar for registration, LXVII.

BASTOO LAND, see *Building Leases.*
BENAMEE.
where lease is taken, landlord can sue the real lessee, 60.
BOUNDARIES, see *Excess Land.*
BUILDING LEASES.
land let on, not liable to enhancement, 41.
but homestead of ryot is not exempt from enhancement, 13, 41.
BURDEN OF PROOF, see *onus probandi.*

CANCELMENT OF UNDER-TENURES.
after sale of superior tenure to be made within a reasonable time, 40, 90.
of lease, see *Lease.*
CAUSE OF ACTION.
where sale of tenure for arrears is reversed, fresh cause of action arises from date of reversal, 62.
declaratory decree not a, 63.
CESSES.
only recoverable when ryot has contracted to pay, 24.
contract to collect an illegal cess void, 24.

CIVIL COURTS.
all suits under this Act to be brought in, XXXIII.
jurisdiction of, in certain suits, XXXV, 70.
where land is situated within the jurisdiction of two courts, XXXVI.
CLASS.
ryots of same, meaning of the term, 42.
COLLECTOR.
definition of, I.
to serve notices
of enhancement, XIV.
of relinquishment, XX.
to make measurements, XXXVII.
procedure to be observed by, in making, XXXVIII, XL.
COLLUSIVE DECREE.
can be set aside for fraud, 84, 85.
COMPENSATION.
in what cases awardable to defendants, XLV.
CROPS.
how to be distrained, LXXI, LXXIV.
DAKHILAS, see *Receipts.*
DAMAGES, see *Exaction of Rent, Receipts, Distress.*
in what cases awardable in suits for arrears of rent, XLIV, 76.
cannot be awarded in addition to interest, 76.
DECLARATORY DECREE.
not a cause of action, 63.
DECREE, see *Execution of Decree.*
DEPENDENT TALOOKDAR, see *Intermediate under-tenure.*
DEPOSITS.
where rent has been deposited, suit for previous arrears to be brought within 6 months, XXXI, 70.
can only be made after tender of rent due, 68, XLVI.
procedure in making, XLVII.
stamp upon application for making, 78.
DILUVION.
a ground for abatement of rent, 47, 48, 49.
and can be pleaded in answer to a suit for rent, 47.
DISABILITY LEGAL.
no deduction allowed for, in rent suits, 62.

DISPOSSESSION.
from defect of lessor's title entitles tenant to proportionate abatement, 48.
principle upon which the abatement is to be made, 48.
DISTRAINT.
landlord of actual cultivator entitled to make, LXVIII.
unless cultivator has given security, *Id.*
shareholders to distrain through common manager, *Id.*
arrears at enhanced rates or of more than one year's standing not recoverable by, LXIX.
gomashtahs, unless specially authorized, cannot make, LXX.
responsibility of landlord for gomashtah's acts, *Id.*
ratification of illegal distraint by landlord, 92.
stored grain not liable to, LXXI.
notice to be served on defaulter, LXXII.
of standing crops, LXXIV.
distrainer if opposed to apply to court for assistance, LXXV.
agent can delegate his power of, LXXVI.
proceedings preliminary to sale, LXXVIII, LXXX.
sale to be suspended, if suit to contest demand is instituted, LXXXI, LXXXIII.
value of suit how to be estimated, LXXXIV.
procedure in conducting sale, LXXXVI, LXXXVIII.
application of proceeds of sale, LXXXIX.
irregularities to be reported to court, XC., XCI.
recovery of expenses of, where sale is stayed, XCII.
second proclamation of sale, XCIV.
in suit to contest demand, burden of proof lies upon distrainer, XCV.
damages for vexatious distraint, XCV.
suit by third party claiming the distrained property, XCVI.
suit for damages, for illegal distress and sale, XCVII.
for wrongful distraint, XCVIII.
for unauthorized distraint, XCIX.
penalty for unauthorized distraint, XCIX, 101, 102.
suits for damages to be brought within three months, C.
date from which the three months is to be reckoned, 102.
resistance of, penalty for, CL.
EJECTMENT.
ryot liable to, for arears due at end of year, 52.

EJECTMENT.—*Continued.*
receipt of rent after forfeiture bars the right of, 53.
holders of transferable tenures not liable to, for non-payment, 53.
barred, if amount is paid within 15 days from decree, LII.
even if lease provides for forfeiture on non-payment, 80.
the 15 days run from final decree, 80.
and a longer period may be granted, 80.
of non-occupancy-ryots and under-tenants holding over after expiration of lease, LIII, LIV.
immediate execution in such cases to be issued, 81.
ENHANCEMENT, NOTICE OF.
in what month to be served, XIV.
how to be served, XIV, 29.
must specify the grounds of enhancement, 27.
must be distinct, 28.
and in case of occupancy-ryot must correspond with grounds mentioned in Sec. XVIII, 28.
ryots in government estates entitled to, 29.
but not if land has been resumed and settled under Reg. VII, 1822, 29.
service of, on naib not sufficient, 29.
if service of, is not proved, case to be dismissed, *Id.*
separate notice to be served for each holding, 29.
unless the holdings have been consolidated, 29.
on whom to be served, 30.
by whom to be served, 30.
ENHANCEMENT OF RENT.
no ryot liable to, except after notice, 19, 28.
occupancy-ryot liable to, only on grounds stated in Sec. XVIII, 28, 41.
grounds of.
prevailing rate, 141.
rates paid by ryots of the same class, 42,
increase in value of produce, or productive powers of land, 42, 43, 44.
rule of proportion to be followed in adjusting rent to increase, 43.
excess land, when liable to, 37, 45.
limitation in suits for, XXIX, 63.

EQUITABLE RELIEF.
in cases of forfeiture, 55, 80.
ESTOPPEL.
tenant estopped to dispute landlord's title, 2.
limitation to this rule, 3.
EXACTION OF RENT.
penalty for illegal, XI.
excess collections if recovered by process of law not exactions, 24.
by duress prohibited, XII.
penalty in such cases, XIII.
EXCESSIVE DEMAND OF RENT.
in suit complaining of, burden of proof lies upon landlord, 31.
but the rate of rent to be paid cannot be fixed in such suit, 32.
EXECUTION OF DECREE.
in cases of ejectment, LII, LIII, LIV, 80, 81.
for pottah, LV.
for kabuliat, LVI.
process not to issue simultaneously against person and property, LVII.
in suits under Rs. 500 not to issue after 3 years, LVIII.
the costs of execution to be reckoned in the Rs. 500, 82.
application for, made within 3 years, can be carried out after the 3 years, 83.
the 3 years dates from the final decree, 83.
against immoveable property when permissable, 86, LXV.
in favour of sharers in joint estates, LXIV, 89.
EXCESS LAND.
liable to assessment, XVIII, 37, 45.
unless included within the boundaries of the lease, 37.
correctness of this ruling discussed, 46.
holder of, not necessarily a trespasser, 45.
held from Permanent Settlement, 47.
EX-PARTE JUDGMENT.
sale under, effect of, 85.
FARMER.
can accept relinquishment or sanction sub-division of holding, 60.
FISHERY.
right of occupancy cannot be acquired in, 13.
FIXED RENT.
meaning of the term, 5.

FIXED RENT.—*Continued.*
who are entitled to hold at, 5.
not affected by the consolidation of several jummas into one, 6.
nor by sub-division of jumma, 6.
land held at, from permanent settlement, 7.
presumption of 20 years' holding at, IV.
FORFEITURE.
waiver of, 54.
by receipt of rent, 52, 54.
equitable relief in cases of, 55.
tenant holding over bound by conditions of, contained in the lease, 55.
right of, once waived cannot be revived, 56.
for non-payment of rent, barred if decree is satisfied in 15 days, 41.
even if lease provides for forfeiture on non-payment, 80.
FRAUD.
when agent is guilty of, limitation runs from discovery of, XXX.
due diligence to be used in discovering, 67.
sale of under-tenure impeachable for, 84.
even if under-tenant is unregistered, 88.
GHATWALEE TENURES.
held on condition of service, 38.
not liable to resumption if service is dispensed with, 38.
GOMASHTAH, see *Agent.*
can serve notice of enhancement, 30.
GOVERNMENT ESTATE, see *Khas Mehal.*
HEREDITARY.
grant not, unless the words *mokururce istumraree* are used, 35.
but usage will supply the omission of the words, 35.
is a right of occupancy hereditary, 14, 15.
HOLDING OVER.
tenant, bound by condition of lease, 50, 55.
HOUSE.
occupancy-ryot can build a pukka house without landlord's consent, 15.
IMMOVEABLE PROPERTY.
execution against, not to issue till moveable property is exhausted, LXV, 86.

IMPROVEMENTS.
ryot not liable to enhanced rent upon, 44.
INTEREST.
awardable on arrears of rent, 52.
but not in addition to damages, 52, 76.
waiver of, by landlord, 52.
INTERMEDIATE TENURE.
not liable to enhancement, if held at fixed rents from Permanent Settlement, XVI.
effect of Government sale on, 32, 39.
are not void, but only voidable after such sale, 40.
and within a reasonable time, 40.
rent of, how to be enhanced, 32.
grounds of enhancement of, 32.
cannot be enhanced beyond customary rates, 33.
rule for enhancement of, when customary rates do not exist, 33, 34.
accretions to, how to be assessed, 34.
presumption in favour of, held at unchanged rent for 20 years, XVII.
in suits for arrears of rent of, arrest before judgment not to issue, L.
procedure on sale of, LIX.
hypothecated to landlord for rent, 84.
sold for arrears, cannot be re-sold for previous arrears, 84.
sale of, impeachable for fraud, 84.
cannot be sold, while other execution is in force, LXI.
person interested in, can stay the sale, LXII.
procedure where third party claims, LXIII.
but unregistered under-tenant cannot claim, 88.
unless he has been recognized by landlord as a tenant, 88.
voidable after sale of superior tenure for arrears, LXVI.
unless created by consent of superior holder, LXVI.
where voidable, to be cancelled by purchaser within a reasonable time, 90.
in what cases voidable, on sale of superior tenure under old procedure, 90.
ISMNAVISSEE PAPERS.
not reliable evidence of extent of ghatwal's holding, 37, *Note*.

JUMMA WASILBAKEE PAPERS.
how to be used as evidence, 11.
JUNGLE BOORIE, see *Lease.*
JURISDICTION, see *Civil Courts.*
KABULIAT.
court cannot fix the term of, 20.
must be given if pottah is tendered, X.
trespasser cannot be sued for, 21.
nor holder of rent-free land, 27.
suit for, at enhanced rent can only be brought after notice, 21, 22.
and must be dismissed if landlord fails to prove that he is entitled to exact rent claimed, 22.
in what cases to be registered, 23.
stamps required for, 23.
in what cases exempt from stamp-duty, 23.
by whom stamp-duty to be paid, 23.
decree for, how to be executed, LVI.
KHAMAR, see *Neej-jote.*
KHAS MEHALS.
rent of ryots in Government, can only be enhanced after notice, 28.
KIND, see *Rents in kind.*
LAKHIRAJ, see *Rent-free.*
LAND-HOLDER.
cannot compel attendance of tenant, XII.
damages against, for extorting payment by duress, XIII.
LANDLORD AND TENANT.
relation of, must be established before a suit will lie, 21.
if denied, court must determine whether it exists, 21.
may exist where land is cultivated by tenant without permission, 45, 46.
tenant estopped from denying landlord's title, 2.
but can show that it has expired, 3.
share-holder may be a tenant, 12, *Note.*
LEASE.
granted by person with limited interest binding upon lessor but not upon reversioner, 3.
in what cases requires registration, 4.
stamp-duty required upon, 4.

LEASE.—*Continued.*
for term, does not necessarily bar a right of occupancy, 15, 17.
not hereditary unless the words "mokururee" or "generation after generation" are used, 35.
but usage will supply the omission of the words, 36.
"year by year" lease, 4, 36.
does lease with defined boundaries cover all land included within the boundaries 37, 46.
specimen of jungle boorie, 37.
where full customary rate is fixed, that rate not to be exceeded, 38.
penalty for breach of conditions of, 54.
cancelment of, for breach of conditions, when permissable, 54.
made void on breach, only voidable at option of lessor, 54.
when taken benamee the real lessee can be sued, 60.
agent cannot grant, unless specially authorized, 65.
effect of ratification of, by landlord, 66.
LESSEES.
entitled to quiet possession, 2.
remedy if evicted, 2.
by title permanent, 2.
by mere stranger, 2.
estopped from disputing lessor's title, 2.
limitation to this rule, 3.
LESSORS.
guarantee quiet possession, 2.
LIMITATION.
general law of, does not apply to rent suits, 61.
and no deduction of time allowed for minority, &c., 62.
suits to which limitation of one year applies, XXVII.
in suits for pottahs and kabuliats, XXVIII.
for arrears of rent, XXIX.
for arrears at enhanced rates, XXIX, 63.
where sale of tenure for arrears is reversed, limitation runs from date of reversal, 62.
in suits for malikana, 63.
against agents, XXX, 67.
against sureties of agents, 64.
in cases of fraud or fraudulent accounts, 67.

LIMITATION.—*Continued.*
in cases in which deposit is made, and further balance is claimed, XXXI, 68.
in decrees for sums under Rs. 500, LVIII, 83.
in suits for damages for illegal distraint.

MALIKANA.
limitation in suits for, 63.

MANAGERS OF KHAS ESTATES.
can sue and be sued under this Act, XXIV.
can exercise the powers of distraint, LXX.

MEASUREMENT.
landlord has a right to make a, XXV, 56.
but not, if he is not in possession, 57, 75.
right of, not affected by land being let out on fixed leases, 57.
zemindar cannot measure lakhiraj land, 57.
application to be made to court by landlord if opposed in making, XXXVII.
value of stamp on which application is to be written, 71, 73.
separate application for each ryot not necessary, 71, 73.
to be made by collector when landlord cannot ascertain who are the tenants, XXXVIII.
detailed survey of estate let out in putnee, 73.
standard pole to be used in making, XLI.
responsibility of using the correct standard lies with Zemindar, 74.
canoongoes papers of great weight in determining standard, 75.

MESNE PROFITS.
can be included in suit for possession, LI.

MINORITY.
cannot be pleaded in bar of limitation in rent suits, 62.

MOKURUREE, see *Hereditary* and *Lease.*

MOUROOSEE.
holdings, 53.

NAIB, see *Agent.*

NEEJ-JOTE LAND.
under what circumstances right of occupancy can be obtained in, 14.
passes to purchaser on sale of Zemindaree, 14.

NOTICE, see *Enhancement, Relinquishment.*

OCCUPANCY, RIGHT OF.
accrues after 12 years' holding, 12.
but only in land used for agricultural purposes, 13.
does not accrue in land used for building, 13.
or in land situated in the centre of a town, 41.
or in a julkur, 13.
an hereditary right, 13.
is it transferable by sale ? 14, 15.
under what circumstances can be acquired in *neej-jote* land, 14.
and by lessee of occupancy-ryot, 16.
when barred by the terms of written leases, 17.
OCCUPANCY-RYOT.
entitled to pottah at fair and equitable rent, 12.
present rent presumed to be fair, 12.
distinction between, and middlemen, 13.
need not register transfer of holding in zemindar's sheristah, 58.
correctness of this ruling discussed, 16, 59.
rent of, can only be enhanced after notice, XIV.
and upon grounds stated in Sec. XVIII, 28.
can resist notice of enhancement by complaint of excessive demand of rent, XV.
and in such suits burden of proof lies upon landlord, 31.
ONUS PROBANDI.
in suits under Sec. XV, lies upon landlord, 31.
PAYMENT OF RENT.
for current year not proof that rent of past year has been paid, 25.
but is *primâ facie* evidence of the fact, 26.
ryot must tender, 52.
PAYMENTS, APPROPRIATION OF, see *Appropriation.*
PERMANENT SETTLEMENT.
date of, 7.
effect of holding from, at unchanged rent, 7.
if rent has been changed, 7.
intermediate tenure held from, XVI, 37.
PLACES ADJACENT.
meaning of, 42.
PLAINT.
form of, to be used in suits, XLIII.
presented by agent to be drawn out in principal's name, 69.

PLEADINGS.
plaintiff must stand or fall by, 20.
when sueing for pottah at fixed rates, cannot ask for a pottah at fair rates, 20.
if not entitled to kabuliat at rent sued for, case to be dismissed, 22.
POTTAH, see *Lease.*
all ryots entitled to, II
what particulars to contain, *Id.*
at fixed rates to whom to be given, III.
occupancy-ryots entitled to, at fair rates, V
non-occupancy-ryots entitled to, at such rates as may be agreed upon, VIII.
term of, to occupancy-ryot may be fixed by court, IX.
but must not extend beyond 10 years, *Id.*
nor the landlord's tenancy, *Id.*
ryot cannot sue for, unless relation of landlord and tenant exists, 20.
tender of, entitles grantor to kabuliat, X.
to be given by the court, if landlord refuses to execute, LV.
PRESUMPTION.
from 20 years' holding at fixed rates, 8.
not invalidated by tenant having relied upon a forged pottah, 8.
only extends to tenants, not to trespassers, 9
cannot be pleaded if holding confessedly commenced after the Permanent Settlement, 9.
but can be pleaded, if date from which holding commenced is uncertain, 10.
proof necessary to establish, 10.
a break in holding rebuts, 11
unless tenant has been unlawfully evicted, 11.
PREVAILING RATES.
what are? 41.
PRINCIPAL UNDISCLOSED.
who takes a lease benamee can be sued upon the contract, 60.
PRODUCE.
increase in value of, a ground for enhancement, 42.
but the increase must be a natural increase, 43
and must have been brought about otherwise than by agency of ryot, 44.

PRODUCE.—*Continued.*
in adjusting the rent to the increase, the rule of proportion to be followed, 43.
of land hypothecated for rent, LXVIII.
PRODUCTIVE POWER OF LAND.
increase in, see *Produce.*
PROPORTION, RULE OF.
when to be applied in adjustment of rents, 43.
PUTNEEDAR.
can cancel under-tenures after sale, 40, *Note.*
but must do so within reasonable time, 40.
can sue for abatement, 49.
QUIET ENJOYMENT.
implied contract for, 2.
disturbance of, by title paramount, 2, 48, 49.
disturbance of, by mere stranger, 2.
RATIFICATION.
of invalid lease by landlord, 66.
of illegal acts of agent in cases of distraint, 92.
RECEIPTS.
evidence necessary to prove, 11.
damages for withholding, XII, 25.
what particulars to contain, XI.
RECEIPT OF RENT.
when a waiver of forfeiture, 54.
REGISTRATION.
what leases require, 4.
such leases if unregistered not proveable by secondary evidence, 4.
of kabuliat, compulsory in what cases, 23.
of under-tenures in zemindar's sherishtah, XXVI.
only transferable intermediate tenures need be registered, 58.
a ryottee tenure, though intermediate and transferable, need not be registered, 58, 59.
penalty for non-registration, 59.
recognition by landlord supplies the place of, 60, 88.
suit to compel, 60.
but zemindar need not register sub-division of a tenure, 60.

REGISTRATION.—*Continued.*
unregistered tenant cannot sue for reversal of sale, 88.
auction-purchaser to apply for, after sale, LXVII.
RELINQUISHMENT.
notice of, in what month to be given, XX.
until given, ryot responsible for rent, XX.
to be served through collector if landlord refuses to accept, XX.
any ryot, whether holding under lease or not, can relinquish, 51.
verbal notice of, in what cases sufficient, 51.
absconding of ryot tantamount to, 51.
stamp-duty upon notice of, 51.
farmer can receive relinquishment of holding, 60.
RENT.
arrear of, see *Arrear.*
fixed rate of, see *Fixed Rent.*
RENT IN KIND.
value of, how to be estimated, 3.
RENT-FREE LAND.
holder of, cannot be sued for a kabuliat, 21.
until right to assessment has been established, 21.
cannot be measured by zemindar, 57.
REVIEW OF JUDGMENT.
to be applied for, within 30 days, CIII.
RYOT, see *also Tenant, Occupancy-ryot.*
entitled to receive a pottah, II.
RYOT NOT HAVING A RIGHT OF OCCUPANCY.
entitled to pottah at such rates as may be agreed upon, VIII.
but cannot sue landlord for pottah, 18.
must either pay the rent demanded or quit, 18.
but if permitted to stay, is only liable to pay a fair rent, 19.
and this rent can only be enhanced after notice, 19, 27.
SALE.
for arrears of revenue.
effect of, on under-tenure, 39.
what under-tenures are protected against, 39.
object of the sale laws explained, 39.
under-tenures after sale not void, but only voidable, 39.
of under-tenures for arrears, LIX, LXVI.

SALE.—*Continued.*
impeachable for fraud, 84.
effect of sale under an *ex-parte* decree which is afterwards set aside, 85.
notice of, what to contain, LX.
of immoveable property illegal, till moveable property and under-tenure in arrear are sold, 86, 87, LXV.
person interested in under-tenure can stay the sale, LXII, LXIII.
effect of, upon encumbrances, LXVI.
certain encumbrances protected, LXVI.
voidable encumbrances to be cancelled within reasonable time, 90.
of under-tenure for arrears under old procedure.
effect of, upon under-tenures, 90.
LE UNDER THE PUTNEE LAW.
effect of, on under-tenures, 40, *Note.*
RVICE TENURES.
zemindar cannot dispense with service and resume the land, 38.
HARE-HOLDER.
when holding land in excess of his share can be sued by co-sharers as a ryot, 12, *Note.*
cannot sue joint-tenant for a kabuliat, 22.
unless the rent has been separately paid by agreement, 23.
can sue agent, if co-sharer is made a defendant, 66.
decree in favour of, how to be executed, LXIV, 89.
cannot distrain except through common manager, LXVIII.
LL CAUSE COURTS.
not empowered to try rent suits, CIV.
MP-DUTY.
on leases, 4.
to be paid by lessee, 4.
cultivators' leases exempt from, 4.
n kabuliats, 23.
exemptions, 23.
notices of relinquishment, 51.
pplications in cases of
measurement, 71,73.
deposit, 78.